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IN THE MATTER OF: )

)

DETERMINATION OF ROYALTY ) Docket No.

RATES AND TERMS FOR ) 16-CRB-0001-SR/PSSR

TRANSMISSION OF SOUND ) (2018-2022)

RECORDINGS BY SATELLITE )

RADIO AND "PREEXISTING" )

SUBSCRIPTION SERVICES )

(SDARS III) )

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## OPEN SESSIONS

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12 (SDARS III) )  
13 -----X  
14 BEFORE: THE HONORABLE SUZANNE BARNETT  
15 THE HONORABLE JESSE M. FEDER  
16 THE HONORABLE DAVID R. STRICKLER  
17  
18 Library of Congress  
19 Madison Building  
20 101 Independence Avenue, S.E.  
21 Washington, D.C.  
22 May 18, 2017  
23 9:24 a.m.  
24 VOLUME XVIII  
25 Reported by: Karen Brynteson, RMR, CRR, FAPR

## 1 A P P E A R A N C E S:

2 On behalf of SoundExchange, The American Federation  
3 of Musicians of the United States and Canada, Screen  
4 Actors Guild and American Federation of Television  
5 and Radio Artists, American Association of  
6 Independent Music, Universal Music Group, Warner  
7 Music Group, RIAA:

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9 STEVEN R. ENGLUND, ESQ.

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1 P R O C E E D I N G S

2 (9:24 a.m.)

3 JUDGE BARNETT: Good morning. Please be  
4 seated. The vagaries of Washington, D.C. commuter  
5 traffic are just that, a vagary.

6 Could you please stand, sir, and raise  
7 your right hand.

8 Whereupon--

9 DAVID DEL BECCARO,  
10 having been first duly sworn, was examined and  
11 testified as follows:

12 JUDGE BARNETT: Please be seated.  
13 Mr. Fakler?

14 MR. FAKLER: Thank you, Your Honor.  
15 Music Choice calls David Del Beccaro.

16 DIRECT EXAMINATION

17 BY MR. FAKLER:

18 Q. Good morning.

19 A. Good morning.

20 Q. Could you state your name for the record,  
21 please.

22 A. David Del Beccaro.

23 Q. And, Mr. Del Beccaro, where are you  
24 employed?

25 A. Music Choice.

1 Q. And what is your job title?

2 A. I'm the chief executive officer and  
3 president.

4 Q. If I could ask you to please turn to the  
5 document in that binder in front of you at tab  
6 Exhibit 55.

7 A. Okay.

8 Q. Do you recognize this document?

9 A. Yes, I do.

10 Q. And what is it?

11 A. It's my written testimony for this  
12 proceeding.

13 Q. And if you turn to the final page in that  
14 exhibit.

15 A. Yes.

16 Q. Is that your signature?

17 A. Yes, it is.

18 MR. FAKLER: Your Honors, at this time, I  
19 would like to offer into evidence Trial Exhibit 55.

20 MR. FREEDMAN: No objection, Your Honor.

21 JUDGE BARNETT: 55 is admitted.

22 (Joint Exhibit Number 55 was marked and  
23 received into evidence.)

24 BY MR. FAKLER:

25 Q. And, if you could turn to the next

1 document in the binder, Exhibit 57.

2 A. Yes.

3 Q. Can you tell us what this is.

4 A. My rebuttal testimony for this  
5 proceeding.

6 Q. And if you turn to the very last page,  
7 again, can you verify whether that's your signature.

8 A. Yes, it is.

9 MR. FAKLER: Your Honors, I'd like to  
10 offer into evidence Trial Exhibit 57.

11 MR. FREEDMAN: No objection, Your Honor.

12 JUDGE BARNETT: 57 is admitted.

13 (Joint Exhibit Number 57 was marked and  
14 received into evidence.)

15 BY MR. FAKLER:

16 Q. Mr. Del Beccaro, in preparing for your  
17 testimony today, did you notice any minor errors in  
18 the written rebuttal testimony that you'd like to  
19 correct?

20 A. Yes. Two errors. At one point, I --

21 Q. Is this page 18?

22 A. Sorry, I'll have to look that up.

23 Q. That's just so we're all clear exactly  
24 what it is.

25 A. Sorry. I need to be in tab 57, right?



1 Q. Right.

2 A. Yes, so in tab 18, there are two  
3 mistakes, actually. I noted four cable operators  
4 when, in fact, one had already bought the other, and  
5 so there are really only three, Comcast, Time  
6 Warner, and Cox. Continental had been purchased by  
7 Comcast.

8 I also rounded up, saying that the MVPD  
9 partners owned over 50 percent of the company, when  
10 they have never owned over 50 percent. They have at  
11 their peak owned slightly less than 50 percent.

12 Q. Thank you. So did you have any role in  
13 founding Music Choice?

14 A. Yes. I --

15 Q. Could you tell us how you started the  
16 business?

17 A. I started working on Music Choice in  
18 January of 1987 as -- at the time, I was employed at  
19 General Instrument, and we were creating at General  
20 Instrument the high-definition television standard,  
21 which was adopted by the country. And I worked in a  
22 business development group, and we thought it would  
23 -- it would be interesting to see what we could do  
24 with digital technology as relates to the radio  
25 industry.

1           Q.   And so what process did you go through to  
2 develop the idea and then the company?

3           A.   Well, we did everything from consumer  
4 research to technology development. We -- we  
5 realized that we could transmit digital audio  
6 signals over cable systems. And so we had to do two  
7 basic things.

8                     One, figure out a technology that could  
9 be easily adopted by cable operators and affordably  
10 by consumers, and then, secondly, find out if  
11 consumers were interested. This was -- January of  
12 '87 was before the overwhelming majority of people  
13 had heard of a CD. So this was very early on. In  
14 fact, we were the first company to broadcast any  
15 kind of a digital signal in -- in the entire world.

16                    We started out doing consumer research,  
17 what would people be interested in, did they want  
18 higher-quality radio, and, interestingly enough,  
19 found out that at that time only -- most of America  
20 was exposed to very little music. In fact,  
21 85 percent of radio stations in the United States  
22 were in five formats.

23                    And so most of America hadn't heard most  
24 music. And -- and the first thing we learned in our  
25 research is what they wanted wasn't really

1 high-quality radio; they wanted what radio didn't  
2 have, all kinds of music formats that most of the  
3 country was not able to get exposure to.

4 And so that's what we set out to do.

5 Q. And just to be clear, were there any  
6 other digital music services at this time?

7 A. Not in January of '87. By the time we  
8 launched the service, we had a couple of other  
9 competitors come into the market.

10 Q. Was all of the technology in place that  
11 you needed to launch this service?

12 A. No, none of it was. It took us millions  
13 of dollars and almost three years to develop the  
14 technology.

15 Q. And did you have any personal role in  
16 helping develop that technology?

17 A. Yes. I not only ran business  
18 development, but the engineering group that oversaw  
19 the development.

20 Q. Could you generally describe Music  
21 Choice's residential audio service?

22 A. Yes. We provide 50 digital music  
23 channels that are commercial free, non-stop music of  
24 various formats throughout the United States. We  
25 are available in just under 50 million homes at

1 present. And we have roughly 47 million people who  
2 listen to our service weekly.

3 Q. And when you say 50 channels, that's 50  
4 channels on the television?

5 A. Yes.

6 Q. Do you offer any additional channels?

7 A. We do offer 25 additional channels  
8 on-line to those same customers, actually a small  
9 subset of those customers. If you are a television  
10 customer, like all television services, you are able  
11 through your subscription to get access to the  
12 product on-line.

13 And like all television providers,  
14 there's -- there are additional -- there's  
15 additional content on-line to try to get people to  
16 -- o use the service on-line.

17 Q. We'll talk a little bit more about that  
18 service later, but at the time that you launched  
19 Music Choice nationally, was the company legally  
20 required to pay the record companies any kind of  
21 royalties?

22 A. No, we were not.

23 Q. And at the time that Music Choice  
24 developed and launched its business, did you think  
25 it would ever have to pay a performance right to the

1 record companies?

2 A. No, we did not.

3 Q. Did terrestrial radio have to pay  
4 performance royalties?

5 A. No, which is why we were confident we  
6 didn't have to.

7 Q. When did the law change to require you to  
8 pay those performance royalties?

9 A. In 1995.

10 Q. And at that time, did Congress require  
11 terrestrial radio to pay these royalties?

12 A. No. They -- they were exempted.

13 Q. And how many digital music services  
14 subject to this performance royalty were operating  
15 at that time in '95?

16 A. Three.

17 Q. Who were they?

18 A. Muzak and DMX and Music Choice.

19 Q. And when Music Choice originally  
20 launched, it had a different name, didn't it?

21 A. Yes, it was called Digital Cable Radio.

22 Q. But the service was offered as Music  
23 Choice?

24 A. No, not until the mid-'90s.

25 Q. Mid-'90s is when you changed over to

1 Music Choice?

2 A. Yes.

3 Q. Now, in 1995 when this royalty obligation  
4 was put in place by Congress, did they also create a  
5 statutory license?

6 A. I'm not sure if it was in '95 or when the  
7 Copyright Act was passed in -- in '98.

8 Q. Well, the license, the statutory license  
9 -- you're aware -- are you aware that Music Choice  
10 is -- has always been eligible for a statutory  
11 license --

12 A. Yes.

13 Q. -- once there was a royalty due?

14 A. Yes.

15 Q. And do you know how that royalty rate is  
16 set, what sort of standard is used to determine the  
17 rates?

18 A. It's a policy standard based on four  
19 factors.

20 Q. And you're generally familiar with those  
21 policy factors --

22 A. Yes.

23 Q. -- having lived with them for this many  
24 years?

25 A. Yes.

1 Q. Now, later on, was that rate standard  
2 changed for some services?

3 A. Yes, but not for us.

4 Q. And have the record companies, since that  
5 time -- when you say "not for us," how did that  
6 work? In other words, you're talking about in 1998  
7 when the standard changed?

8 A. Yes. The standard changed for others but  
9 not for us, but even since then, the record -- the  
10 music companies have continuously lobbied Congress  
11 to change the policy, and -- and Congress has not  
12 agreed to do so.

13 Q. Has Music Choice had to be involved in  
14 any of that process?

15 A. Yes. We have had to talk to people in  
16 Congress to present our side of the story. And so  
17 far they have not changed.

18 Q. Now, in the development of Music Choice's  
19 history and ownership, did there come a time when  
20 any record companies invested in Music Choice?

21 A. Yes, in 1993 and 1994.

22 Q. And which companies were those?

23 A. Warner Music and Sony Music in 1993, and  
24 EMI Music in 1994.

25 Q. Now, did they invest directly or through

1 affiliates or --

2 A. Every company that has invested in Music  
3 Choice has directed through an affiliate. That's  
4 common practice for corporate investments.

5 Q. But were any record company executives  
6 actually involved in that investment process?

7 A. Yes, record company executives were  
8 directly involved and met with me personally dozens  
9 of times and negotiated directly with me.

10 Q. And how much of the sound recording  
11 market at that time did those record companies  
12 control?

13 A. Approximately two-thirds.

14 Q. And what did Music Choice have to -- to  
15 do to secure those investments?

16 A. Well, one of the things we did, a major  
17 concession we made was to give them a copyright  
18 license fee, which the radio industry had refused to  
19 give.

20 Q. And -- and, again, that was before at  
21 that point there was any legal performance royalty  
22 for sound recordings, right?

23 A. That is correct.

24 Q. So why did the record company investors  
25 ask for this?



1           A.    They wanted to set the precedent that --  
2   that they should and deserved and are entitled to a  
3   -- a copyright fee by radio broadcasters.

4           Q.    And why did Music Choice agree to it?

5           A.    Well, most fundamentally, we needed the  
6   money. We needed the capital. We had been  
7   operating for a number of years and -- and were not  
8   close to profitable yet. And we also wanted the  
9   support of the music industry in the venture.

10          Q.    What was the royalty rate payable on an  
11   industry-wide basis?

12          A.    2 percent.

13          Q.    I'm sorry?

14          A.    2 percent.

15          Q.    Now, shifting gears again out of the  
16   wayback machine and going to just slightly wayback  
17   machine --

18                JUDGE BARNETT: Mr. Del Beccaro -- excuse  
19   me. Mr. Del Beccaro, 2 percent of --

20                THE WITNESS: 2 percent of our net  
21   revenue. Same --

22                JUDGE BARNETT: Net revenue?

23                THE WITNESS: Same basis that we pay the  
24   8 and a half percent today.

25                JUDGE BARNETT: Okay, thanks.

1 BY MR. FAKLER:

2 Q. So skipping ahead to the most recent last  
3 rate proceeding, the SDARS II rate proceeding, what  
4 starting point did the Judges use to set the current  
5 PSS royalty rate?

6 A. 7 and a half percent.

7 Q. Was that the existing rate at the time?

8 A. Yes.

9 Q. And did the Judges find that that  
10 7.5 percent rate satisfied the 801(b) policy  
11 factors?

12 A. They did.

13 Q. But they did raise the rate, right?

14 A. Yes.

15 Q. And why did they do that?

16 A. Because at the time, our intention was to  
17 expand from 50 to 300 channels, and there was a  
18 sense that that would lead to a large increase in  
19 usage of music. That's what the Judges felt, is my  
20 understanding. And, therefore, we should pay a  
21 higher rate.

22 Q. Now, had any participant in the  
23 proceeding, had SoundExchange made that arrangement  
24 during the proceeding?

25 A. No.

1 Q. Or anybody else?

2 A. No.

3 Q. Now, if Music Choice had been afforded  
4 the opportunity to address this concern of the  
5 Judges, what would it have shown?

6 A. Well, we would have pointed out that a  
7 customer can't listen to more than one song at a  
8 time. So if I have more channels and I'm now  
9 listening to this channel instead of that channel,  
10 I'm not consuming more music.

11 So unless we were increasing our customer  
12 base, which wasn't happening and not projected to  
13 happen, it wouldn't lead to more listening. And if  
14 it did lead to more revenue, then the 7.5 rate would  
15 have captured the increase in revenue. So we  
16 wouldn't have agreed that it made sense because  
17 consumption was not going to go up, in our minds.

18 Q. Now, setting that aside, did Music Choice  
19 actually go ahead and expand to 300 channels?

20 A. No, we couldn't afford to.

21 Q. So would you say that Music Choice has  
22 been overpaying in this past rate period?

23 A. Yes.

24 Q. What is Music Choice's rate proposal in  
25 this proceeding?

1 A. 5.6 percent.

2 Q. And is that 5 -- 5.6 or no higher or --  
3 in other words, is -- is a range acceptable to Music  
4 Choice or is -- in other words, is 5.6 the top of  
5 the range or is it just 5.6?

6 A. I'm not sure how to answer that question.

7 Q. It's not meant to be a memory test.

8 A. I feel like our proposal is 5.6 percent.

9 Q. And why are you asking for a rate  
10 reduction?

11 A. Well, one, because we overpaid for an  
12 extended period of time and the offset needs to be  
13 more on a percentage basis because our revenues were  
14 higher. So that's the primary reason.

15 But I also feel that, you know, compared  
16 to our fundamental competition, radio, we're at a  
17 significant disadvantage and -- and we should be  
18 paying a lower rate.

19 Q. And are there -- are there any changes to  
20 Music Choice's financial condition relevant to the  
21 801(b) factors that also militate in favor of a  
22 reduction?

23 A. Well, the market has become tougher  
24 financially, and the available pie gets smaller  
25 every year because of the dynamics in the cable

1 industry and the television market.

2 And so our ability to make a profit and a  
3 return in this business has become significantly  
4 lower than five years ago.

5 Q. So with respect to the 801(b) policy  
6 factors, why don't we talk first about -- skip to  
7 the second factor, of fair income and fair return.

8 How many years did Music Choice operate  
9 with annual losses?

10 A. 12 years before we turned a profit.

11 Q. And at this point, has Music Choice  
12 generated enough profit from the residential audio  
13 service alone to cover the total investments in the  
14 company?

15 A. No, we have not.

16 Q. So on a cumulative basis, has Music  
17 Choice's residential audio business, taken alone,  
18 yet returned a profit?

19 A. We have not returned a profit, no.

20 Q. Has Music Choice become profitable on a  
21 consolidated basis, based on all your business  
22 lines?

23 A. Yes.

24 Q. And where has that profit come from?

25 A. Largely from the commercial music

1 business.

2 Q. Business lines other than the --

3 A. Yes.

4 Q. -- residential?

5 A. Other than residential audio.

6 Q. And has Music Choice made distributions

7 to its partners ever?

8 A. Yes.

9 Q. Would Music Choice have been able to make

10 those distributions if it had only offered a

11 residential audio service?

12 A. No, they did not.

13 Q. And if you turn to page 21 of your

14 written direct testimony at tab 55.

15 A. Okay.

16 Q. If you look at the top of the page, do

17 you give the numbers there of what the cumulative

18 losses for the residential audio, taken alone, were

19 at the beginning of 2015?

20 A. Yes, I see them.

21 Q. And the --

22 A. Do you want me to state them out loud?

23 Q. No, no, no. Right now we're in public

24 session --

25 A. Okay.

1 Q. -- Mr. Del Beccaro. So anything that is  
2 commercially sensitive, we're to go to try to work  
3 off of the document so we don't have to say it out  
4 loud, but we can -- those that have access to that  
5 data can read them.

6 A. Okay.

7 Q. And that projects how that loss is  
8 expected to increase?

9 A. Yes.

10 Q. By 2018? And if you look at the middle  
11 of that page, just before subheading B, you give --  
12 do you give a rate of return even taking the entire  
13 consolidated business into account?

14 A. Yes, I do.

15 Q. What the annualized rate of return -- is  
16 that an accurate number?

17 A. Yes, it is.

18 Q. Now, how does Music Choice's overall  
19 financial condition compare now to the way it was at  
20 the time of the SDARS II proceeding?

21 A. We're not as healthy as we were at that  
22 point in time.

23 Q. So we'll talk a bit about the changes in  
24 the market conditions that Music Choice has  
25 experienced and the impact those changes have had on

1 the audio service's financial performance, but for  
2 context, let's discuss the development of the PSS  
3 market a little bit, do a little bit more of a  
4 history lesson first.

5           Was Music Choice ever offered as a  
6 premium standalone product?

7           A.    Yes.

8           Q.    And can you explain how that was?

9           A.    When we first started, we had to be a  
10 premium product because we -- no households in the  
11 United States had a device that could receive a  
12 digital signal and turn it into something a human  
13 ear could hear.

14                So we had to develop technology and put a  
15 box in the home. And we had to develop a technology  
16 that transmitted a digital signal to the home. And  
17 that was -- between all that technology and actually  
18 the service calls to the home, that required a  
19 substantial investment by the cable operator, not  
20 just our investment. And so we charged 10 dollars a  
21 month to recoup that investment or so the cable  
22 operator could recoup that investment.

23           Q.    And when did that change?

24           A.    It started to change in the mid-'90s with  
25 DirecTV. It didn't change in the cable industry,



1 didn't start to change in the cable industry until a  
2 little bit later because when DirecTV started, they  
3 could -- when they launched in 1994, they could use  
4 the latest technology available in 1994; whereas  
5 cable operators had all these boxes in homes that  
6 had been there since the '80s, and so it would take  
7 them longer to transition over.

8 Q. And when did Music Choice's business  
9 model change away from the premium a la carte model?

10 A. It -- fundamentally, the change started  
11 in 1994 with DirecTV.

12 Q. Okay. And -- and how did it change? How  
13 did Music Choice adapt its business model?

14 A. So when we were selling a la carte, it's  
15 a -- it's a much more difficult business model and  
16 was a much more difficult business model because  
17 getting people to pay 10 dollars a month for  
18 something they were used to getting for free was --  
19 was very difficult. That cost a lot of money in  
20 marketing expenses, and you had to stand out in the  
21 crowd, differentiate your brand on a -- on a pretty  
22 significant basis.

23 With DirecTV, since their technology was  
24 completely digital, they were able to offer Music  
25 Choice to every customer as part of the service. So

1 we didn't have to embark on anywhere near the same  
2 consumer marketing investment.

3           And so we moved from an a la carte  
4 service, where a large amount of the revenue went to  
5 technology recovery and service cost recovery, to a  
6 basic service where, whether you use the service or  
7 not, you effectively subsidize the service, just  
8 like, frankly, all basic television networks.

9           Q.    So if I understand you, you moved then to  
10 a model where the Music Choice service was bundled,  
11 no longer charged separately for, but bundled with  
12 the cable service?

13          A.    That is correct.

14          Q.    And what sort of market penetration --  
15 when you first moved to that model, what kind of  
16 market penetration was Music Choice able to get?

17          A.    We were averaging about 1 to 1.5 percent  
18 penetration in various markets around the country.

19          Q.    And how did that change over time?

20          A.    Well, at DirecTV we were in 100 percent.

21          Q.    And how about over time with the cable  
22 operators?

23          A.    We -- we were able to strike deals  
24 starting in the very late '90s where we were in  
25 100 percent of digital homes, and so over time

1 through the 2000s and -- and even the recent 2010  
2 decade, digital boxes have now permeated throughout  
3 cable, and so we're in most every home in cable.

4 MR. FAKLER: Your Honors, at this point,  
5 I'm going to be getting into a range of questions  
6 with highly competitively sensitive information.  
7 Could we please close the courtroom?

8 JUDGE BARNETT: Of course, Mr. Fakler.  
9 At this time, we will close the hearing room.

10 (Whereupon, the trial proceeded in  
11 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. FAKLER:

3 Q. But just -- Mr. Del Beccaro, just be  
4 aware that we're in public session, okay?

5 Now, Mr. Del Beccaro, you are aware, are  
6 you not, that the record industry has previously had  
7 a challenge in the transition from CD to digital  
8 revenue streams, right?

9 A. Yes.

10 Q. But even during those periods, how have  
11 record company profits compared to Music Choice's?

12 A. Of course, they have much larger  
13 companies, and they have much larger profits.

14 Q. Now, if we could turn to another one of  
15 the policy factors, maximizing the availability of  
16 creative works. Does the Music Choice residential  
17 audio service help maximize the availability of  
18 creative works to the public?

19 A. Yes.

20 Q. And how?

21 A. Well, while today there's a large  
22 distribution of the music over the Internet as an  
23 example, there are tens of millions of homes who  
24 don't have practical Internet access on any  
25 reasonable basis and certainly a cost-effective

1 basis. So while -- while, even lower income homes  
2 have Smartphones they don't have data plans that  
3 would allow them to consume music.

4 So Music Choice is one of the most  
5 fundamental ways that dozens of different music  
6 formats are exposed to tens of millions of homes  
7 that otherwise wouldn't be.

8 Q. And what effect does that additional  
9 exposure have for the record companies?

10 A. Well, exposing more people to more music  
11 leads to increased usage, increased sales.

12 Q. Does Music Choice -- Music Choice's audio  
13 service substitute for other types of music services  
14 that pay higher royalty rates to the record  
15 industry?

16 A. No.

17 Q. What does Music Choice's audio service  
18 primarily substitute for in the market?

19 A. Radio.

20 Q. And how do you know this?

21 A. We know it for two reasons, two  
22 fundamental reasons. The first is that everybody by  
23 now is familiar with Spotify and Pandora and very  
24 familiar with the explosion in their usage, in  
25 subscriptions in the last five years.

1                   And research has shown that Music Choice  
2 usage has gone up in each of the last four years.  
3 And so if we were substitutional, the fact that  
4 their usage has exploded and ours stills goes up  
5 wouldn't make any sense.

6                   And we know that from our own research.  
7 We also know it from research outside our company.  
8 We know it, for example, from Cumulus radio.  
9 Cumulus radio is the second largest radio group in  
10 the United States with over 500 radio stations. And  
11 we have been in an active partnership with them for  
12 over three years.

13                  They approached us because their research  
14 showed that their listeners listen to them at work  
15 and in the car, but when they got in the house, that  
16 they turned on Music Choice. And their listening in  
17 the home went down very substantially.

18                  And so they approached us to work on a  
19 partnership, and to this day, we -- we've been  
20 working together. We promote their service and they  
21 promote ours because while we substitute for them,  
22 they basically in a sense ceded the home, feeling  
23 that we have a good hold on those customers.

24                  And so what we are working on together is  
25 promoting -- we're promoting a brand of theirs in

1 our homes in a way that they could not achieve even  
2 through their radio stations.

3 Q. Now, in Music Choice internal documents,  
4 does the company sometimes refer to services like  
5 Spotify or Pandora as competitors?

6 A. Yes.

7 Q. And when that happens, what do you mean  
8 by the term "competitors"?

9 A. Well, everybody in the music space has  
10 access to consumers. And so -- and, of course, most  
11 of the documents where we deal with Spotify --  
12 Spotify and Pandora are documents either related to  
13 people outside the company or the Board because  
14 everybody, bluntly, thinks that companies like  
15 Spotify and Pandora are going to put us out of  
16 business.

17 And so while we -- our obvious, most  
18 intense competition is with Stingray, because we  
19 compete with them for cable operators, and then our  
20 second most obvious competition is radio, because  
21 that's -- that's what we are, we're a television  
22 radio company.

23 Everybody at the Board level, as an  
24 example, is worried that these other businesses,  
25 these other business models, are going to wipe us

1 out. And so it's usually in that context.

2 Q. And what do you mean by business models  
3 being what you're talking about?

4 A. Well, they have a fundamentally different  
5 business model. First off, Spotify has a very  
6 different business model than Pandora, but both of  
7 them have fundamentally different business models  
8 than Music Choice.

9 And so what, frankly, most people presume  
10 and assume is that companies like that who have  
11 invested literally hundreds of millions of dollars  
12 in their brands have so much brand equity that  
13 consumers will eventually drop us, and we'll become  
14 the dust heap. So --

15 Q. Has that proven to be -- come to pass?

16 A. No. And, in fact, as I stated before,  
17 our usage has gone up in each of the last four  
18 years, which is the prime achievement time frame of  
19 their success.

20 Q. Does Music Choice invest in its own  
21 original creative works?

22 A. Yes.

23 Q. What kind of creative content does Music  
24 Choice create?

25 A. It's almost all on the video side. We --



1 we have artists in our offices every week, and we  
2 film interviews with them and we do various stunts  
3 with them.

4 Q. Is there any creative work involved in  
5 the curation of the audio channels --

6 A. Yes.

7 Q. -- or the on-screen display?

8 A. Yeah. So that gets -- I talked about one  
9 of those earlier, the -- the curation techniques  
10 that we have invested in and use are clearly  
11 differential from Stingray and others.

12 And then we also invest a significant  
13 amount in what we do on screen. We invested heavily  
14 in developing that technology and we invest  
15 routinely every day in personnel who work on what  
16 shows up on the screen, coincident with the music  
17 that's played.

18 Q. How important is the on-screen component  
19 of the audio channel to the service, to the value of  
20 the service?

21 A. Our surveys say that over 90 percent of  
22 our customers routinely look at the screen and know  
23 what we're doing on the screen at least once a song.

24 Q. Does the on-screen component of the audio  
25 service differentiate Music Choice's service from

1 others in the field?

2 A. Yes. It's a patented technology that we  
3 have, and we're able to provide contextual  
4 information related to what's playing on television.  
5 Others are not.

6 Q. How has the current rate affected Music  
7 Choice's ability to help maximize the availability  
8 of creative works?

9 A. Well, those -- creative and marketing  
10 were departments that were --

11 Q. And let's not get into exact numbers  
12 because we're in open. Just wanted to give you a  
13 reminder. We can talk about some more details in a  
14 little bit.

15 A. I mentioned two numbers before. Those  
16 two departments were cut back by the higher number.

17 Q. And at the time of the SDARS II  
18 proceeding, was Music Choice increasing its  
19 investments in these forms of creative content?

20 A. Yes.

21 Q. Okay. So why don't we move on to another  
22 of the policy factors, the relative contributions.  
23 Generally speaking, how do Music Choice's -- and  
24 just to refresh you a little bit, we're talking  
25 about relative contributions to creative, technical

1 contributions, capital investment costs, risks, and  
2 opening new markets, things like that.

3 Do you remember that, one of the longest  
4 of the policy factors?

5 A. Yes.

6 Q. Generally speaking, how do Music Choice's  
7 contributions stack up against the record  
8 industry's?

9 A. Well, in terms of this particular market  
10 segment, there is no -- there's no incremental  
11 investment of -- of any substance by the record  
12 companies. So they don't really have an investment  
13 in what happens at Music Choice.

14 Of course, Music Choice has to expend a  
15 considerable amount of investment in order to  
16 function and to prosper.

17 Q. And when the record companies invest in  
18 these various segments, do they make those  
19 investments with the PSS in mind?

20 A. No.

21 Q. And do the record companies contribute at  
22 all to the curation or original content on Music  
23 Choice?

24 A. No.

25 Q. Did Music Choice have to create any of

1 the technology necessary to launch the service?

2 A. Yes.

3 Q. And I think you spoke generally about  
4 that before. Can you give some more specific  
5 examples of the type of technology that had to be  
6 invented?

7 A. Well, the television industry is, of  
8 course, created for video. And so all the  
9 technology from what happens over a satellite to  
10 what moves down transmission lines to set-top boxes  
11 has always -- to video on-demand, as an example, has  
12 always been built for video products that had audio.

13 And Music Choice is almost the exact  
14 opposite. We're an audio product that has an  
15 on-screen video interface. And so none of the  
16 technology worked without our personal intervention  
17 and creativity and development.

18 So that's in the -- in the most  
19 fundamental way.

20 Q. Now, in more recent times, has Music  
21 Choice continued to invest in technology?

22 A. Yes, this -- this comes up all the time.  
23 So, for example, even now in video on-demand, which  
24 has really started to blossom in the last couple of  
25 years but has been worked on for the last ten years,

1 even now when companies create technology to make  
2 video on-demand and to make it work, for example,  
3 across platform, it's always done with video in  
4 mind.

5           The only service that is audio in the  
6 industry of any note is ours. And so usually what  
7 happens is they develop -- they may develop a  
8 break-through on how to bring a consumer product to  
9 the country, but then we have to spend time  
10 reworking with their development staffs to make it  
11 work for music-related products. So it's a -- it's  
12 a routine investment on an ongoing basis.

13           MR. FAKLER: Your Honors, at this point,  
14 I think I need to go back into a restricted session.

15           JUDGE BARNETT: We will be closing the  
16 hearing room again. Except for Music Choice, of  
17 course.

18           (Whereupon, the trial proceeded in  
19 confidential session.)

20

21

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25

1 O P E N S E S S I O N

2 BY MR. FAKLER:

3 Q. So just keep in mind, Mr. Del Beccaro,  
4 the public is listening.

5 A. Okay.

6 Q. Now let's talk a little bit about the  
7 effect on Music Choice of SoundExchange's rate  
8 proposal. If you would turn to page 21 of your  
9 written rebuttal testimony, tab 57.

10 A. Okay.

11 Q. And, you know, now that we're in public  
12 session, if you would just look under the heading of  
13 the devastating effect section on that page.

14 A. Yes.

15 Q. Do you see the first highlighted figure?  
16 Is that the amount of the effective percentage of  
17 revenue that the SoundExchange proposal would  
18 require Music Choice to pay?

19 A. It is, but that number is low. And the  
20 reason it's low is because that's what it would be  
21 immediately. But as I've discussed, as we  
22 renegotiate these contracts, our rate is going to go  
23 lower.

24 So having any kind of fixed rate is going  
25 to be extraordinarily problematic in this -- this

1 number.

2 Q. Right.

3 A. Sorry, I almost said it. This number  
4 will jump up dramatically over time.

5 Q. And could Music Choice possibly agree to  
6 this kind of rate if it were negotiating in a  
7 hypothetical competitive marketplace?

8 A. No. If -- if this was our business and  
9 this is the rate, then it would mean we would have  
10 to exit the business.

11 Q. And if you turn to tabs 924 and 925,  
12 please.

13 A. Yes.

14 Q. Now, are these similar financial analyses  
15 that you did before but showing what the impact of  
16 SoundExchange's rate proposal would be on Music  
17 Choice?

18 A. Which tab?

19 Q. 924 and 925.

20 A. Yes.

21 Q. And turning back to page 23 of your  
22 written rebuttal testimony, please. And tab 57.

23 A. Yes.

24 Q. So without getting into the specifics, is  
25 this the area where you discuss what the annual net

1 income was, as a standalone residential audio  
2 service, Music Choice would experience under  
3 SoundExchange's proposed rate?

4 A. Yes.

5 Q. And later in that paragraph, you note  
6 that the bundled projections including the video  
7 would be somewhat better, right?

8 A. Yes.

9 Q. But, again, is that driven entirely by  
10 projections and increases in advertising revenue for  
11 the video?

12 A. Yes.

13 Q. But even combining those, Music Choice  
14 would -- the residential product would still be  
15 unprofitable under the SoundExchange proposal,  
16 correct?

17 A. Yes. And that requires an increase in  
18 advertising revenue that we've been unable to  
19 achieve in the first 12 years of our attempts to do  
20 so.

21 Q. Now, SoundExchange's rate proposal also  
22 includes the request that Music Choice have to pay  
23 an additional webcasting royalty for  
24 transmissions -- Internet transmissions to its  
25 subscribers, right?



1 A. Correct..

2 Q. How long has Music Choice been  
3 transmitting -- been offering ancillary Internet  
4 access to its subscribers?

5 A. Since the mid-1990s.

6 Q. And how heavy has the usage been of the  
7 Internet product?

8 A. It's a -- it's an extremely low percent.  
9 It's 4 hundredths of 1 percent of our listening.

10 Q. And has it always been that low or lower?

11 A. Yes.

12 Q. So just to be clear, you know, in this  
13 past 20 years, you're talking about the mid-'90s,  
14 which was before the first CARP proceeding, right?

15 A. Yes.

16 Q. And, in fact, it was before Congress even  
17 created the PSS designation, right?

18 A. Yes.

19 Q. Now, during all that time, has  
20 SoundExchange ever argued in any rate proceeding or  
21 any settlement negotiation for the rate or any  
22 audit, that Music Choice -- that those Internet  
23 transmissions weren't already covered by the PSS  
24 royalty?

25 A. No.

1 Q. Now, did SoundExchange or its former  
2 parent, RIAA, ever contact Music Choice about its  
3 Internet product?

4 A. Yes.

5 Q. And when was that? Do you recall?

6 A. I don't remember the specific year.

7 Q. But roughly? Was it more than ten years  
8 ago?

9 A. It was a long time ago. I'd have to  
10 look.

11 Q. Well, if you take -- well, I guess the  
12 details aren't super important there. But what --  
13 what was discussed? Do you recall what was  
14 discussed with RIAA?

15 A. Well, in some sense, I think it was --  
16 well, what was discussed is they were trying to say  
17 that we now have a -- a new product that isn't  
18 covered. And that, of course, wasn't true. That  
19 product existed when the PSS was established -- PES  
20 was established.

21 And -- and so we simply pointed out to  
22 them that this has been there all along and it has  
23 been out in the open all along. All their -- all  
24 their member companies, UMG, Warner, Sony, were  
25 totally aware of it, and I don't know why the

1 particular person who was negotiating with me was  
2 trying to bring up this point.

3 Q. And how did that back and forth  
4 ultimately end up?

5 A. They backed away and -- and admitted  
6 that, you know, there was nothing there.

7 Q. And if you turn to tab 926.

8 A. Yes.

9 Q. Can you tell me what this is?

10 A. Okay. So this is in that time frame  
11 where the person that I most routinely dealt with,  
12 Steven Marks, was trying to claim that we were doing  
13 something new, starting -- well, we were doing  
14 something new, and, therefore, we needed to pay them  
15 separately for it.

16 Q. And does this refresh your recollection  
17 as to the time frame that we're talking about here?

18 A. Yes.

19 Q. When was it?

20 A. 2004.

21 Q. And Mr. Marks -- Music Choice has -- from  
22 time to time, while in happy or older times, has  
23 managed to settle a couple of these rate  
24 proceedings, right, with SoundExchange?

25 A. Yes.

1           Q.   Who did you negotiate those settlements  
2 with personally?

3           A.   Steven Marks.

4           Q.   Now, after this exchange with RIAA and  
5 Mr. Marks, did Music Choice continue to invest in  
6 its Internet app and web portal?

7           A.   Yes.

8           Q.   So has SoundExchange been paid for any  
9 value that the Internet product adds to Music  
10 Choice's service through the existing rate?

11          A.   Yes, because all television services are  
12 available on the Internet. There -- there's no TV  
13 everywhere concept, unless they're all available.

14                If we, for example, were -- were to  
15 restrict our availability to simply TV, not only --  
16 forget about the competitiveness advantage. Cable  
17 operators won't actually contract with us because  
18 they need to be able to say that you have the rights  
19 to view this on all devices. Of course, you have to  
20 -- it's only because you have the subscription. So  
21 we're not available on the open Internet.

22                And that's a pretty fundamental  
23 distinction between us and other companies. This --  
24 these rates, for example, that Pandora and others  
25 pay, they have the right to provide their music

1 services on the open Internet for which they pay  
2 those rates. Music Choice doesn't have that. Music  
3 Choice has to remain as part of a subscription. And  
4 so we don't -- we have never provided our services  
5 on the open Internet.

6 Q. And in your experience, is it unusual for  
7 a TV programming provider to bundle its Internet  
8 access along, you know, with the television channels  
9 to the MVPDs at one charge?

10 A. Yes.

11 Q. Does Stingray provide Internet  
12 transmissions?

13 A. Yes.

14 Q. And has it been paying webcasting  
15 royalties the whole time it has been doing that?

16 A. No.

17 Q. Now, do you know when they stopped  
18 paying?

19 A. They stopped paying in '14, '15 time  
20 frame, if I'm not mistaken.

21 Q. And do you know whether Stingray had  
22 actually stopped providing these Internet streams in  
23 2015?

24 A. I know they provided the streams in that  
25 time frame.

1 Q. And --

2 A. I heard them.

3 Q. I'm sorry.

4 A. I listened to them.

5 Q. And was there something very major  
6 happening in Stingray's business in the end of 2014,  
7 early 2015 time frame?

8 A. Yes, that's when they won the contract  
9 for AT&T from us.

10 Q. And is the AT&T platform particularly  
11 heavy with respect to streaming and app-based usage?

12 A. Yes. That is the product.

13 Q. So having been on AT&T in the past and  
14 knowing the size of the MVPD, would Stingray's  
15 Internet streaming usage go up dramatically in that  
16 time, because of that addition?

17 A. Yes. Prior to that, Stingray had been in  
18 only very small operators. And the incidence of TV  
19 everywhere in small operators in the 2013 time frame  
20 was almost nonexistent. So they would have had  
21 basically no usage on-line.

22 Q. Just to return to an earlier topic  
23 because when you discussed the -- and I know that  
24 you mentioned before that, before they got the AT&T  
25 account, all of the rest of their MVPDs were

1 relatively very small MVPDs --

2 A. Yes.

3 Q. -- right? Does that fact impact  
4 Stingray's ability to ramp up and take a large  
5 market share while paying the CABSAT rates?

6 A. Yes, because their customers --

7 Q. And we can't give the details.

8 A. Yeah.

9 Q. We're in open. So if you can say it --

10 A. Okay. So the customers that they had  
11 prior to AT&T were paying us considerably more than  
12 the Verizon rate I quoted, the very high Verizon  
13 rate. So the clump they were in was extraordinarily  
14 high. So paying 2 cents out of that price on a  
15 percentage basis would have been actually less than  
16 the percent we were paying.

17 But the lion's share of the market is  
18 with the big guys. And as we talked about in the  
19 earlier sessions, their price and the price  
20 necessary for them, 2 cents in, for example, the two  
21 affiliates we have been unable to win business in,  
22 would -- would be completely untenable.

23 Q. And can Music Choice track individual  
24 performances, streaming performances, through its  
25 app or website?

1           A.   No, we can -- we can tell if you've  
2 logged on to a stream, but we -- so we can tell you  
3 listen to a channel. We can't tell what songs were  
4 played while you were there.

5           Q.   And can you tell with any granularity  
6 exactly when the listening occurred?

7           A.   No. Our -- our current capabilities do  
8 not give us that information.

9           Q.   So if Music Choice had to pay the  
10 existing commercial webcasting royalties based on  
11 each individual performance or listen by an  
12 individual customer, could it do so?

13          A.   We don't have the reporting tools to do  
14 that.

15          Q.   Now, turning to just briefly the  
16 regulations, the proposals that SoundExchange has  
17 made for changes in the regulations, have the  
18 existing PSS regulations been in place for a long  
19 time?

20          A.   Yes.

21          Q.   And were they set in the very first CARP?

22          A.   Yes.

23          Q.   And have they changed since then in any  
24 material way?

25          A.   No.



1 Q. And in all that time, have there been any  
2 problems with respect to the functioning of the  
3 regulations?

4 A. No.

5 Q. Has SoundExchange ever come to Music  
6 Choice and complained about any feature of the  
7 regulations?

8 A. No.

9 Q. And what would be the result of changing  
10 the regulations after all of this time on Music  
11 Choice?

12 A. Well, changing the regulations would  
13 fundamentally only affect Music Choice. And so that  
14 means we would have to go through some expense in  
15 order to do different. And, bluntly, I think, given  
16 that -- the regulations require compliance that  
17 basically we have to meet.

18 We're very skeptical about proposed  
19 changes because certainly in prior periods, they  
20 have proposed changes which effectively meant we  
21 paid more. But they were done in subtle ways that  
22 weren't apparent.

23 So I don't -- you know, this has worked  
24 for 20 years. I don't know why it requires a  
25 change.

1           Q.   Now, in your written testimony, you go  
2 through in significant detail what your -- what you  
3 were best able to figure out some of the changes are  
4 because they weren't presented in a way that was  
5 easy to see all of the changes from the existing PSS  
6 regs.

7           A.   Yes.

8           Q.   And not to go through in that minutiae  
9 here live, but several of the changes relate to the  
10 confidentiality provisions, right?

11          A.   Exactly. And that would be a very big  
12 problem.

13          Q.   Can you explain the importance of the  
14 existing confidentiality regulations to Music  
15 Choice?

16          A.   Yes. The music companies have tried two  
17 different things that providing them with more  
18 confidential Music Choice information would be  
19 compromising. The first is when we negotiate our  
20 video license agreements with them, they routinely  
21 try to get us to, in essence, renounce our payment  
22 structure on audio and pay a higher rate. And so  
23 any additional information that they could get to  
24 help that cause would hurt us.

25               The second thing they -- they do is they

1 have routinely over the years tried to work directly  
2 with the cable operators on the video side of the  
3 business and eliminate us as a provider in between.

4           So, again, you know, we're not anxious to  
5 provide them with information that allows them to  
6 try to eliminate the role we play.

7           Q.   And is Music Choice a publicly traded  
8 company?

9           A.   No.

10          Q.   Is it -- are -- are a lot of Music  
11 Choice's business information kept confidential and  
12 not available to the public?

13          A.   Yes, almost all of it.

14          Q.   Now, several of the other changes that  
15 are being proposed have to do with the audit  
16 provisions.

17          A.   Yes.

18          Q.   Right? And one in particular has to do  
19 with the eliminating the utility of the -- what you  
20 refer to in your testimony as a defensive audit  
21 provision.

22          A.   Correct.

23          Q.   Can you just tell us briefly what the  
24 defensive audit provision is?

25          A.   Okay. The defensive audit allows us to

1 have one of the accomplished and renowned accounting  
2 firms to audit our payments and structure with  
3 SoundExchange and we make adjustments, if necessary,  
4 based on those audits.

5 Q. So rather than -- as a proactive measure,  
6 can Music Choice have an independent auditor come  
7 and verify the payments on an annual basis?

8 A. Yes, that's what we do.

9 Q. And those substitute for an audit  
10 conducted by SoundExchange?

11 A. Yes. And that is what we do.

12 Q. And was that asked for in the very first  
13 CARP?

14 A. Yes.

15 Q. Very specifically by the PSS?

16 A. Yes.

17 Q. And has Music Choice been taking  
18 advantage of this provision?

19 A. Yes, every year.

20 Q. On occasion, has Music Choice ever,  
21 through this process, found a late payment that  
22 required a true-up for interest?

23 A. Yes. In the -- in the '13-'14 --

24 Q. Don't give numbers because we're in open  
25 session.

1           A.    -- right -- time frame, what the audits  
2 found is that while the amounts of the payments were  
3 all correct, that some of our payments were late.  
4 We were having late payment issues with a number of  
5 vendors. And so the audit found that we had made  
6 some payments late, and so we assessed and paid the  
7 interest based on the audits.

8           Q.    Without waiting for any external audit  
9 from SoundExchange?

10          A.    No. I mean, correct, without waiting.

11          Q.    So, well, in closing, since we're  
12 approaching the lunch hour, in SoundExchange's  
13 opening, their lawyer, Mr. Handzo, told the Court  
14 that Music Choice was coming to Court in this  
15 proceeding to tell a sob story.

16                   How do you respond to that?

17          A.    Well, I don't believe I've ever met him.  
18 I don't know him. I don't know why he thinks it's a  
19 sob story. I think -- I mean, we certainly don't  
20 feel like we're a sob story.

21                   I think that the people at our company  
22 are very proud of what we have done. We're the  
23 first digital broadcaster in the world. We brought  
24 music formats to masses of people in the United  
25 States that never had that exposure. We were the

1 first people to multi-cast on the Internet. We were  
2 the first people to put a music service on the  
3 telephone. We were the first people to develop  
4 interactive services on television, on the video  
5 side.

6 And most people who look at the video  
7 interface we've created and started introducing this  
8 year is well ahead of anybody else. So I think -- I  
9 think that most people would describe our company as  
10 being full of relentless optimists, and not whining,  
11 sob story people.

12 And, you know, look, we've stayed at this  
13 business. It wasn't until the 13th year we achieved  
14 profitability. We're now in our 13th year of  
15 unprofitability on the video side, and we're not  
16 giving up. So I don't -- I don't know what he's  
17 talking about.

18 Q. Thank you, Mr. Del Beccaro.

19 MR. FAKLER: That concludes my direct  
20 examination.

21 JUDGE BARNETT: Thank you, Mr. Fakler.  
22 Very timely. Mr. Freedman, will you be conducting  
23 cross-examination?

24 MR. FREEDMAN: Yes, Your Honor. I'm glad  
25 to proceed now or to go to lunch as you prefer.

1 JUDGE BARNETT: Let's take our noon  
2 recess. We'll be back -- Mr. Fakler, if we return  
3 at 1, will that still --

4 MR. FAKLER: Yes.

5 JUDGE BARNETT: -- leave you enough time  
6 to complete your other witness?

7 MR. FAKLER: Yes, Your Honor.

8 JUDGE BARNETT: Okay, 1:00 o'clock.

9 (Whereupon, at 12:03 p.m., a lunch recess  
10 was taken.)

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1                    A F T E R N O O N                    S E S S I O N

2 (1:14 p.m.)

3 JUDGE BARNETT: Good afternoon. Please  
4 be seated. Mr. Freedman?

5 MR. FREEDMAN: Yes, Your Honor, I think  
6 Mr. Handzo wanted to address a housekeeping matter  
7 before the cross-examination.

8 JUDGE BARNETT: Good.

9 MR. HANDZO: If I may, I know it is  
10 always the highlight of the day. So just to close  
11 the loop on the George White exhibits we talked  
12 about yesterday.

13 JUDGE BARNETT: Yes.

14 MR. HANDZO: I think we have agreed on a  
15 sort of process to put that to bed. The process is  
16 that Sirius XM will let SoundExchange know by the  
17 end of the day tomorrow which of those they object  
18 to and which they do not.

19           To the extent that there are still  
20   objections, we have agreed to submit letter briefs  
21   to the Court simultaneously close of business on  
22   Wednesday, letter briefs not to exceed three pages.

23                   And then -- so that's those. And then  
24 Ms. Whittle asked me to read into the record the  
25 numbers, just so we're clear on what they are.



1 JUDGE BARNETT: Thank you.

2 MR. HANDZO: So they are 161.1, 162, 163,  
3 170, 171, 173, 175, 177.1, 177.2, 179, 180.1, 180.2,  
4 184.1, 184.2, 186, 190, 194.1, 194.2, 200, 201.1,  
5 201.2, 203, 205, 206, 209, 210, 211, 212, 215, 217,  
6 218, 219, 220, 228, 229, 233, 236, 237, 239, 335.1,  
7 335.2, 336, 337, 340, 341, 342, 343, 344.1, 344.2,  
8 344.3.

9 (SoundExchange Exhibit Numbers 161.1,  
10 162, 163, 170, 171, 173, 175, 177.1, 177.2, 179,  
11 180.1, 180.2, 184.1, 184.2, 186, 190, 194.1, 194.2,  
12 200, 201.1, 201.2, 203, 205, 206, 209, 210, 211,  
13 212, 215, 217, 218, 219, 220, 228, 229, 233, 236,  
14 237, 239, 335.1, 335.2, 336, 337, 340, 341, 342,  
15 343, 344.1, 344.2, 344.3 were marked for  
16 identification.)

17 MR. HANDZO: Then lastly, there were six  
18 exhibits that SoundExchange -- I'm sorry, five  
19 exhibits that SoundExchange was going to move into  
20 evidence that are objected to, so I am going to read  
21 those numbers into the record. And we're going to  
22 fold them into the same letter brief that I alluded  
23 to earlier.

24 JUDGE BARNETT: Thank you.

25 MR. HANDZO: Those are 263.7, 345, 367,

1 368, and 369.

2 (Sound Exchange Exhibit Numbers 263.7,  
3 345, 367, 368, and 369 were marked for  
4 identification.)

5 JUDGE BARNETT: Thank you. Mr. Rich?

6 MR. RICH: Your Honor, we have agreed to  
7 the procedure. Just to be clear, so there are no  
8 surprises, we would anticipate as to at least a  
9 number of these, and intend to preserve, and I think  
10 Mr. Handzo understands that we intend to preserve  
11 the argument that these were untimely presented even  
12 for proffers of evidence given that they could have  
13 been shown to witnesses in a timely fashion.

14 But rather than burden the record now  
15 with that, we will try to minimize obviously any  
16 disagreements, but I want to make crystal clear the  
17 fact that they are being proffered now is not by us  
18 any concession that they are being timely proffered,  
19 subject only to hearsay or earlier objections.

20 MR. HANDZO: And I understand that  
21 reservation. And we will deal with it in the  
22 briefs.

23 JUDGE BARNETT: Thank you.

24 JUDGE STRICKLER: Will the brief also  
25 make that timeliness argument as well?

1 MR. RICH: To the extent we feel it is  
2 appropriate to as to particular arguments we will.

3 JUDGE STRICKLER: Thank you.

4 JUDGE BARNETT: Thank you very much.

5 Now, Mr. Freedman?

6 MR. FREEDMAN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. FREEDMAN:

9 Q. Good afternoon, Mr. Del Beccaro.

10 A. Good afternoon.

11 Q. I am Jared Freedman, one of the lawyers  
12 for SoundExchange, and I will be asking you some  
13 questions.

14 So you believe the statutory rates that  
15 Music Choice pays for its residential audio service  
16 are too high, correct?

17 A. Yes.

18 Q. But you have never asked any of the  
19 record companies to grant you a direct license for  
20 your residential audio service at a rate below the  
21 statutory rate, right?

22 A. Well, yes, originally back when we  
23 negotiated our first licenses with them, we did  
24 negotiate a lower rate.

25 Q. And, I'm sorry, when was that?

1 A. In the 1990s.

2 Q. Since the 1990s, you have not, correct?

3 A. Oh, no, I -- I have in my negotiations  
4 with Steven Marks and, in fact, prior to this  
5 proceeding requested that the rate be moved to  
6 below.

7 Q. And you have never -- Music Choice has  
8 never obtained a direct license with any record  
9 company below the statutory rate for its residential  
10 audio service, correct?

11 A. Well, we did in 1993 and 1994.

12 Q. I apologize.

13 A. Since the -- since the PSS, no.

14 Q. So since that 1993/'94 time frame, you  
15 have not, correct?

16 A. No.

17 Q. "No" meaning I am correct?

18 A. No, we haven't gotten a lower license  
19 than the proceeding. Is that what you are asking  
20 me?

21 Q. I am asking whether you have ever  
22 negotiated a direct license, so --

23 A. Oh, no, other than -- not since '94.

24 Q. So since '94, you have never negotiated  
25 -- you have never successfully negotiated a direct

1 license for your residential audio service below the  
2 statutory rate, correct?

3 A. Correct.

4 Q. And I think I understood you to say this  
5 morning that if you were to -- it would be cost  
6 prohibitive to try to negotiate direct licenses with  
7 all of the record companies; is that right?

8 A. Correct.

9 Q. And I think you said you had estimated it  
10 would cost you 3 million dollars; is that right?

11 A. Minimum, per year.

12 Q. Per year. So by using the statutory  
13 license, you avoid that 3 million dollars per year  
14 cost; is that right?

15 A. Yes.

16 Q. Now, you are aware that the major record  
17 companies and their distribution companies  
18 distribute numerous independent record labels,  
19 right?

20 A. Yes, that's in the 50 percent that I had  
21 spoken about this morning.

22 Q. Well, isn't it true that the market share  
23 of the Majors, if you counted by what they  
24 distribute, is closer to 80 percent?

25 A. No, not for the music we play.

1 Q. Not for music you play?

2 A. No. I mean, our analysis is it is  
3 49 percent.

4 Q. And if you negotiated with the Majors  
5 direct licenses with the Majors, and if you  
6 negotiated direct licenses with, say, Merlin and  
7 INGrooves, you would have a substantial chunk of the  
8 market of the music you play, right?

9 A. Well, it would be a little over half.  
10 Remember we're not playing just what radio plays.  
11 We have formats radio would never touch and we go  
12 much deeper. So we're going -- we're far more  
13 likely to play an independent label's music than  
14 other outlets.

15 Q. And my question now is it is not all or  
16 nothing in terms of direct licenses; in other words,  
17 you could negotiate direct licenses with some of the  
18 record companies and have the rates you can get in  
19 those licenses and then you could use the statutory  
20 rates for whatever repertoire is not covered by  
21 those, right?

22 A. Theoretically. From a practical  
23 standpoint, no record company -- the major record  
24 companies are not going to open a negotiation with  
25 us and talk about a lower rate. You know, they

1 already have in their minds, it is a floor, it is  
2 too low, so their conversations are always we should  
3 have it higher.

4               So it is -- that's a theoretical  
5 possibility, but not a practical one.

6           Q.    So it is your understanding they won't  
7 give you a right below the statutory rate, correct?

8           A.    I'm sure their stance now is that,  
9 correct, yes.

10          Q.    Now, did I understand you this morning to  
11 say that you believe Music Choice competes with  
12 terrestrial radio?

13          A.    Yes.

14          Q.    Do people listen to Music Choice  
15 primarily in the home?

16          A.    Yes.

17          Q.    Do people listen to terrestrial radio  
18 primarily in the car?

19          A.    Yes.

20          Q.    Now, you would agree that the statutory  
21 PSS rate -- when I say PSS, you understand I am  
22 talking about the statutory license that applies to  
23 Music Choice?

24          A.    Yes.

25          Q.    You would agree the statutory PSS rate is

1 lower than the rates that all the other types of  
2 digital music services pay for the use of sound  
3 recordings, other than terrestrial radio, right?

4 A. Yes.

5 Q. Sirius XM pays a higher statutory rate  
6 for its SDARS, right?

7 A. Yes.

8 Q. The CABSATs pay higher statutory rates,  
9 right?

10 A. Yes.

11 Q. Music Choice pays a higher statutory rate  
12 for its business establishment service, right?

13 A. It is a completely different basis but  
14 yes.

15 Q. Statutory webcasters pay higher rates  
16 than you, right?

17 A. Yes.

18 Q. And Music Choice in its video services  
19 agreements pays higher rates than the statutory PSS  
20 rate, right?

21 A. Yes.

22 Q. And interactive webcasters pay higher  
23 rates than under their direct licenses than you pay?

24 A. Yes.

25 Q. Correct?



1 A. Yes.

2 Q. But you think it is fair that artists  
3 should receive lower royalties from Music Choice  
4 than from every other music service in the  
5 marketplace, right?

6 A. The largest player in the marketplace is  
7 radio, and they pay nothing. So we pay more and  
8 we're radio. We're not the services you outlined.  
9 We're nothing like the services you outlined.

10 Q. And as compared to all those other  
11 services, you think artists should receive less from  
12 you than from all those other services, right?

13 A. Artists make more when they perform a  
14 concert too. It doesn't have anything to do with  
15 us.

16 Q. So Music Choice has been in business for  
17 over 30 years; is that right?

18 A. Yes. 30 years. This is year 30.

19 Q. This is year 30?

20 A. Yeah.

21 Q. Okay. And as an overall enterprise,  
22 Music Choice is currently profitable, correct?

23 A. Yes.

24 Q. You are not testifying that Music  
25 Choice's overall business has suffered 30 years of

1 losses, right?

2 A. No.

3 Q. Music Choice is in business to make a  
4 profit, right?

5 A. Yes.

6 Q. And Music Choice has continued to offer  
7 its residential audio service for the past 30 years  
8 because it contributes to the profitability of Music  
9 Choice's overall business, right?

10 A. Well, as we -- as I testified earlier,  
11 the first 12 years we didn't make any money. We  
12 have had other years, for example, I mean, this year  
13 we're basically just above break-even. So, you  
14 know, we did not make money the entire 30 years, but  
15 if you are -- but the point being that we're in  
16 business to make money is absolutely true.

17 Q. And as part of that profit-maximizing  
18 effort, you have continued to offer the residential  
19 audio service, correct?

20 A. Yes.

21 Q. Now, in the ordinary course of business,  
22 you don't maintain a separate balance sheet for  
23 Music Choice's residential audio service, meaning  
24 separate from the rest of the business, correct?

25 A. No.

1 Q. In the ordinary course of business, Music  
2 Choice accounts for the costs and revenues for the  
3 overall business as a whole, right?

4 A. Yes.

5 Q. And you looked with Mr. Fakler this  
6 morning at two exhibits, Exhibit 918 and 919. I  
7 don't know if you still have that binder.

8 A. Yes.

9 Q. And I know you are overwhelmed with paper  
10 here.

11 A. Which one do you want to look at?

12 Q. I just wanted to make sure you recalled  
13 what they were for the moment.

14 A. Yes, yes. I have them right here.

15 Q. Those documents were prepared for this  
16 litigation, correct?

17 A. Yes.

18 Q. Those are not documents that are  
19 maintained in the ordinary course of business,  
20 right?

21 A. No.

22 Q. And if you look at Exhibit 919, that  
23 doesn't -- does that include -- does that include  
24 Music Choice's entire business or is there a portion  
25 of the business not included?

1           A.    It doesn't -- it does not include  
2 commercial.

3           Q.    Okay.

4           MR. FREEDMAN: Your Honor, at this time I  
5 would like to to ask a few questions that I think  
6 may relate to some restricted information of Music  
7 Choice, so I would ask that we close the courtroom,  
8 please.

9           JUDGE BARNETT: Sure. We will  
10 temporarily close the hearing room.

11                   (Whereupon, the trial proceeded in  
12 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. FREEDMAN:

3 Q. Mr. Del Beccaro, you are not an  
4 economist, right?

5 A. No.

6 Q. You are not claiming to offer expert  
7 economic opinions in this case, are you?

8 A. No.

9 Q. You are not a lawyer, right?

10 A. No.

11 Q. You are not offering legal opinions,  
12 right?

13 A. No.

14 Q. And you are not an accountant, are you?

15 A. No.

16 Q. Now, I want to ask you about page 20 of  
17 your written direct testimony.

18 A. Okay.

19 Q. So I want to avoid saying anything  
20 restricted out loud if we can. I will certainly  
21 try.

22 A. Okay.

23 Q. But do you see in the first paragraph on  
24 page 20 you refer to an amount that Music Choice's  
25 partners have invested in the company?

1 A. Yes.

2 Q. Now, that amount was invested over the  
3 course of 30 years; is that right?

4 A. Yes, but it was invested in the original  
5 12 years is the way to think about it.

6 Q. So the amount that is listed there was  
7 all -- I am not sure what the verb is -- was all  
8 invested in the company in the first 12 years?

9 A. Frontloaded.

10 Q. Was front loaded as you say?

11 A. Yes.

12 Q. And no investments since then?

13 A. No.

14 Q. And the investors have realized returns  
15 on their investment over that time period over the  
16 last 30 years, right?

17 A. Yes.

18 Q. And has some of that investment helped  
19 fuel Music Choice's non-statutory video service line  
20 of business?

21 A. Yes.

22 Q. Now, Music Choice is a partnership with  
23 various companies, correct?

24 A. Yes.

25 Q. And you talked about that this morning.

1 Do you recall that?

2 A. Yes.

3 Q. And, in fact, on page 2 of your indirect  
4 testimony, you list the companies who are partners  
5 in Music Choice?

6 A. Yes.

7 Q. And you were involved in the formation of  
8 the partnership, right?

9 A. Yes.

10 Q. And you helped secure the financing for  
11 the partnership, right?

12 A. Yes.

13 Q. And in your written testimony you discuss  
14 the partnership and some of the negotiations you had  
15 with some of the partners, correct?

16 A. Yes.

17 Q. And, in fact, earlier this morning from  
18 judge -- you had some questions from Judge Barnett  
19 where you discussed the partnership arrangements as  
20 it was formed in 1999; is that right?

21 A. Well, reformed. Not reformed even.  
22 Recalibrated might be a better expression.

23 Q. Well, was there a partnership agreement  
24 signed in 1999?

25 A. We had a partnership agreement and we

1 amended it, yes.

2 Q. So just so we're sort of using the same  
3 language so I don't misspeak, in 1999 was the  
4 partnership agreement amended; is that fair?

5 A. Yes.

6 Q. Okay. And you answered some questions  
7 about that this morning. Do you recall that?

8 A. Yes.

9 Q. Okay. I want to show you Exhibit 504 if  
10 I may. I'm sorry, when I say "show you," I mean it  
11 is in the binder we passed out.

12 A. Oh, this one. Okay.

13 Q. Did you find it there behind the tab 504?

14 A. Yes.

15 Q. Now, do you see these are some responses  
16 from Music Choice to some interrogatories in this  
17 proceeding?

18 A. Yes, I see that.

19 Q. And if you turn to page 4.

20 A. Okay.

21 Q. Do you see there is an Interrogatory  
22 Number 1. And then going on to page 5, there is a  
23 response from Music Choice?

24 A. Yes.

25 Q. Do you see that?



1 A. Yes.

2 Q. And in this response Music Choice  
3 describes how each of its current partners acquired  
4 its ownership interest in Music Choice among other  
5 things. Do you see that there?

6 A. Yes, I do.

7 Q. Have you seen this document before?

8 A. Yes.

9 Q. Did you review it before counsel  
10 submitted it?

11 A. Yes.

12 MR. FREEDMAN: Your Honor, at this time I  
13 move admission of Trial Exhibit 504 into evidence.

14 MR. FAKLER: No objection, Your Honor.

15 JUDGE BARNETT: 504 is admitted.

16 (SoundExchange Exhibit Number 504 was  
17 marked and received into evidence.)

18 BY MR. FREEDMAN:

19 Q. Now, we were discussing a minute ago the  
20 partnership agreement, and I want to ask you now to  
21 turn to the next tab, which is Exhibit 505.

22 A. Okay.

23 Q. Do you recognize this document?

24 A. Yes, it has been a while since I looked  
25 at this document.

1 Q. I'm sorry?

2 A. It has been a while since I looked at  
3 this document.

4 Q. But you have seen this before?

5 A. Yes.

6 Q. And what is it?

7 A. It is the amendment to the partnership.

8 Q. And this is the one you were discussing  
9 earlier today?

10 A. It is one of them. This is -- this  
11 amendment actually came a little later than -- this  
12 morning's discussion was mostly around 1999.

13 Q. Yes.

14 A. This amendment is 2004.

15 Q. I see. Now, if I could also have you  
16 turn, if you look at Exhibits 507, 508, and 509, I  
17 will ask you if you also recognize those documents?

18 A. Yes.

19 Q. And what are those?

20 A. These are amendments to extend the term  
21 of the partnership.

22 MR. FREEDMAN: Your Honor, at this time I  
23 would move the admission of Trial Exhibits 505, 507,  
24 508, and 509.

25 MR. FAKLER: With the clarification these

1 are not the partnership agreements that Mr. Del  
2 Beccaro was actually testifying about, no objection.

3 JUDGE BARNETT: 505, 507, 508, and 509  
4 are admitted.

5 (SoundExchange Exhibit Numbers 505, 507,  
6 508, and 509 were marked and received into  
7 evidence.)

8 BY MR. FREEDMAN:

9 Q. Now, I don't think this is restricted,  
10 but if the answer that you would give needs you to  
11 say restricted information, just let us know.

12 A. Okay.

13 Q. But, well, is Music Choice currently  
14 majority-owned by cable companies?

15 A. No.

16 Q. Okay. If I ask you some questions about  
17 the percentages, though, is that restricted?

18 A. It is not public knowledge.

19 Q. Okay. So I don't want to -- I don't want  
20 to utter anything restricted. I am trying to be  
21 careful.

22 A. I know there is a chart here, though,  
23 that I could say yeah, that's the percentage.

24 MR. FREEDMAN: So, Your Honor, I  
25 apologize, but very briefly, can we go into

1 restricted session? I'm sorry.

2 JUDGE BARNETT: Sure. We will close the  
3 hearing room for a very short period.

4 (Whereupon, the trial proceeded in  
5 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. FREEDMAN:

3 Q. So one reason that you think the PSS  
4 rates should be reduced is because you believe the  
5 Judges set the rate too high five years ago; is that  
6 right?

7 A. Yes.

8 Q. And you want the rate lowered for one  
9 reason is essentially to make Music Choice whole for  
10 what you view as sort of its overpayments over the  
11 last few years, right?

12 A. Correct.

13 Q. So if the Judges were to set a statutory  
14 rate too low, is it your testimony that the Judges  
15 should then in a subsequent proceeding increase the  
16 rate to make Copyright Owners and artists whole?

17 A. It depends on what the reason for the too  
18 low is. In this particular case you have a factual  
19 reason for the increase that was turned out to be  
20 factually incorrect. So I don't know if a corollary  
21 could happen and is conceivable.

22 Q. When you say factually incorrect, you  
23 mean --

24 A. We didn't expand to the 300 channels.

25 Q. Okay. So new topic. You would agree the

1 marketplace for digital music services is changed  
2 significantly over the past 30 years, right?

3 A. Yes.

4 Q. And Music Choice was one of the very  
5 first digital music services, right?

6 A. Yes.

7 Q. Were you the first?

8 A. Yes.

9 Q. But over the years there has been a  
10 proliferation of lots of services that offer digital  
11 streaming of sound recordings, right?

12 A. Yes.

13 Q. And one reason you think the PSS rates  
14 should be lower is because of the challenging  
15 economic environment that Music Choice faces, right?

16 A. I think the rates should be lower because  
17 Congress's policy states that there are -- there is  
18 a basis for which our rate needs to be set, and that  
19 consistent with that basis, our rate should be  
20 lower.

21 Q. And does the current economic or  
22 financial condition in which Music Choice finds  
23 itself relevant to that?

24 A. Yes.

25 Q. One of the factors that you talked about

1 in your written testimony is the competitive  
2 pressure from various market entrants that seek to  
3 undercut your pricing. Do you recall that?

4 A. Yes.

5 Q. And that's one of the challenges you are  
6 facing, right?

7 A. Yes.

8 Q. And that includes competition from  
9 Stingray, right?

10 A. Yes.

11 Q. And it is your view Stingray tries to  
12 undercut your prices?

13 A. Yes.

14 Q. Stingray tries to take business away from  
15 you, right?

16 A. Yes.

17 Q. And, in fact, you lost AT&T to Stingray,  
18 right?

19 A. Yes.

20 Q. And Stingray is trying to make inroads in  
21 the market and trying to replace your service with  
22 its service on other cable carriers, right?

23 A. That's correct.

24 Q. And in your view the reason Stingray has  
25 not been able to gain greater market penetration is

1 because you offer a superior product, correct?

2 A. Yes.

3 Q. But you're aware Stingray filed a lawsuit  
4 against Music Choice, correct?

5 A. Well, they filed a nuisance claim against  
6 us because we sued them for patent infringement.

7 Q. Right. So you sued them first and then  
8 they countersued you, correct?

9 A. Yes.

10 MR. FAKLER: Your Honor, I would like to  
11 object to this line of questioning as outside the  
12 scope of anything that Mr. Del Beccaro has testified  
13 to in this proceeding. Patent infringement cases  
14 against Stingray have nothing to do with this case.

15 JUDGE BARNETT: How is this related to  
16 Mr. Del Beccaro's testimony?

17 MR. FREEDMAN: Sure, Your Honor. I'm not  
18 actually interested in the patent infringement part  
19 of it. What I am interested in is the unfair  
20 competition claims that Stingray has made in a  
21 federal lawsuit that they filed against Music  
22 Choice. And that's what I intend to ask him about.

23 He talks in his testimony about the  
24 competition that they face from Stingray and that  
25 the reason they are beating Stingray is because they



1 have a superior product. I want to ask him about  
2 the unfair competition and tortious interference  
3 claims that Stingray made against them in a federal  
4 lawsuit.

5 MR. FAKLER: Your Honor, as I am sure  
6 Your Honor is well aware, unfair competition is a  
7 body of law. Although it has the word "competition"  
8 in it, that does not mean it is logically related to  
9 the sort of competition that Mr. Del Beccaro is  
10 discussing in this case and is the subject of this  
11 case.

12 As Mr. Del Beccaro already stated, it was  
13 a countersuit filed in the context of a complex  
14 patent litigation.

15 JUDGE BARNETT: All right. And claims  
16 are just claims. Objection sustained.

17 BY MR. FREEDMAN:

18 Q. Now, you're aware and I think you  
19 testified this morning that Sirius XM operates its  
20 CABSAT service at the statutory CABSAT rates, right?

21 A. Yes.

22 Q. And you're aware Stingray operates its  
23 CABSAT service at the statutory CABSAT rates, right?

24 A. Yes.

25 Q. Those companies make business decisions

1 to operate at those rates, correct?

2 A. Yes.

3 Q. Just like you have made a business  
4 decision to operate at the PSS rates, right?

5 A. Yes.

6 Q. And if the statutory rates are too high,  
7 any of those services, you or the CABSAT services,  
8 you can try to negotiate below the statutory rate,  
9 right?

10 A. Well, as I stated earlier from a  
11 practical standpoint, there is no chance that the  
12 major labels would discuss with us a lower rate.  
13 They wouldn't even -- it is such a non-concept.

14 You know, they -- we have discussed audio  
15 rates many times and as recently as March in detail,  
16 and they do not want to discuss a compromise rate or  
17 anything like that. They have simply tried to get  
18 us to pay higher rates.

19 There is no concept of a conversation  
20 starting from scratch, let's just say. It doesn't  
21 work like that.

22 Q. And you could choose if you wanted to not  
23 to offer residential audio service, correct?

24 A. Well, if we did, we would be out of  
25 business. It is 97 percent -- it is -- it is a huge

1 portion of our revenue. And so if we decided to  
2 exit the residential audio business, we would have  
3 no business.

4 JUDGE STRICKLER: Excuse me, counsel.

5 I wanted to ask you a question, so  
6 perhaps only tangentially related to this, but in  
7 the competition that you noted with Stingray, as  
8 between Stingray and Music Choice.

9 THE WITNESS: Yes.

10 JUDGE STRICKLER: Did you say that  
11 Stingray is paying more -- well, Stingray is paying  
12 more money to the labels under its license that it  
13 negotiated or that it is subject to by way of the  
14 settlement than Music Choice is presently; is that  
15 right?

16 THE WITNESS: They are paying a different  
17 rate structured at a higher rate per customer on  
18 average. But, remember, their average license fee,  
19 while their license fees are always lower than ours  
20 for that particular customer, their average license  
21 fee is higher than ours because they only have small  
22 customers and one moderate size customer.

23 JUDGE STRICKLER: So on a per customer  
24 basis, they pay more?

25 THE WITNESS: Yeah.

1 JUDGE STRICKLER: And did you say also  
2 that when it came to the fees that they were  
3 charging to the cable companies, they were charging  
4 less?

5 THE WITNESS: For the same customer, they  
6 charge less than we do, yes.

7 JUDGE STRICKLER: So I wanted to try to  
8 relay that to the first factor under 801(b)(1),  
9 which is maximizing the availability of music.

10 If they are paying more money to the  
11 labels, at least on a per-subscriber basis, that's  
12 compared to Music Choice giving more money to the  
13 labels and therefore to the artists as well, and if  
14 they are paying -- if they are receiving less money  
15 from the cable companies, they are competing with  
16 you on price and they are making it more affordable,  
17 all other things being equal, for the cable  
18 companies to be able to obtain the music that is  
19 then accessed by the customers.

20 So both on the upstream market with the  
21 labels and in the downstream market with regard to  
22 the cable companies, it seems like that rate is  
23 more -- better satisfies the 801(b)(1) first factor  
24 with maximizing availability. Suppliers are induced  
25 and the customers get a lower price.

1                   Is there something wrong with that  
2 analysis?

3                   THE WITNESS: The problem with that is  
4 that it only works when you are creaming the high  
5 end of the market. So I will give a theoretical  
6 price just for practical discussion.

7                   Let's say we were charging somebody 50  
8 cents. It is easy to come in and say: Okay, well,  
9 now you can have it for 40 cents. And then win a  
10 deal.

11                  When you take the summation of all that  
12 both from a revenue standpoint because we're talking  
13 about cable companies that have hundreds or  
14 thousands of customers, instead of millions and tens  
15 of millions of customers. So from a practical  
16 standpoint, what we're talking about are lower rates  
17 to very few people.

18                  When you go into the larger clumps that I  
19 spoke about this morning, there is -- the only way  
20 they could win that business -- and this is why they  
21 haven't won business from the largest cable  
22 operators -- they would have to price it below the  
23 rate that they are paying for cable -- CABSAT.

24                  So it won't work. That's why it is easy,  
25 like I say, if somebody is at 50 cents to undercut

1 us on price and say well, I'm achieving your desired  
2 outcome.

3 JUDGE STRICKLER: So when you said they  
4 are skimming the cream, the cream you referred to  
5 are the smaller --

6 THE WITNESS: Yeah, the operators who  
7 bluntly have the least amount of leverage and have  
8 to pay the absolute highest price.

9 JUDGE STRICKLER: And because they have  
10 to pay the average highest price, in that sense it  
11 is the cream?

12 THE WITNESS: Yes.

13 JUDGE STRICKLER: Thank you.

14 BY MR. FREEDMAN:

15 Q. I wanted to ask you about page 31 of your  
16 written rebuttal testimony, please.

17 A. Okay.

18 Q. And if you look in the first full  
19 paragraph, I want to ask you about part of the first  
20 sentence there where you say that Music Choice does  
21 not receive the data necessary to track individual  
22 performances.

23 Do you see that?

24 A. Yes.

25 Q. And is this -- I should have asked one

1 other question first.

2 Is this with respect to your Internet  
3 transmissions that this discussion is taking place?

4 A. This is with respect to all our business.

5 Q. I'm sorry?

6 A. This is in respect -- well, this  
7 paragraph, yes. I see in the first clause it says  
8 for Internet transmissions.

9 Q. I apologize. I did that out of sequence  
10 but so we're on the same page.

11 A. Sure.

12 Q. It is your testimony that with respect to  
13 your Internet transmissions, Music Choice doesn't  
14 receive the data necessary to track individual  
15 performances; is that right?

16 A. Correct.

17 Q. Okay. Now, when you say Music Choice  
18 doesn't receive the data, is that because Music  
19 Choice has a contractor that collects usage data for  
20 Music Choice's Internet transmissions?

21 A. Could you repeat that?

22 Q. Sure. Does Music Choice have a  
23 contractor who collects usage data for Music  
24 Choice's Internet transmissions?

25 A. No, I don't believe -- I don't believe

1 so. The reason -- here is the difference between  
2 what we do and maybe some others do. We take our  
3 broadcast and put it on the Internet.

4 So each song is not an individual asset  
5 the way it is, for example, for Pandora. So in  
6 Pandora, while you are getting a stream, it is this  
7 song and it is that song and then this song. We're  
8 streaming a broadcast network.

9 So when we find out that you listened to  
10 it for 50 minutes, we don't know what was on in the  
11 50 minutes. We don't have that kind of data.

12 And Pandora knows that they sent you that  
13 song and then they know they sent you the next song.  
14 So we don't have that kind of data.

15 Q. And so, for example, have you ever heard  
16 of a company called Triton?

17 A. Yes.

18 Q. And you don't use a company like that to  
19 receive usage data for your Internet transmissions?

20 A. No.

21 Q. You are not suggesting that it is  
22 technologically impossible to know how many  
23 listeners are listening to each performance of your  
24 Internet transmissions, right? You are just saying  
25 you don't track it, correct?



1           A.    Yes, we don't track it because it would  
2 be prohibitively expensive. Remember, we have the  
3 incredibly low percentage I mentioned this morning  
4 of our listening. And so to spend the amount of  
5 money it would take to embed the streams with the  
6 collection data would be -- let me put it this way.  
7 It would cost more to do that than we make overall  
8 in the whole business, so it wouldn't be worth it.

9           Q.    You mentioned a few minutes ago, I think,  
10 by way of example, you referred to Pandora and the  
11 way they may receive data, correct?

12          A.    Yes.

13          Q.    You're aware that, in fact, there are  
14 thousands of webcasters who rely on a statutory  
15 webcasting license and they manage to count the  
16 number of performances included in their  
17 transmissions, right?

18          A.    Yes, they are in a different business.  
19 They are -- how they send their signals, everything  
20 is different from us. They are not radio.

21          Q.    I want to ask you about terms for a  
22 minute.

23          A.    Sure.

24          Q.    Did I hear you this morning say that  
25 SoundExchange's proposed changes to the terms

1 regulations effectively mean that you end up paying  
2 more?

3           A.    What you heard me say is that is one of  
4 my fears, yes, that they would end up, in essence,  
5 tricking us into subtle ways. I mean, for example,  
6 in the past, they have proposed subtle changes for  
7 the definition of revenue, which seems very inert,  
8 but, in fact, would result in us -- in them  
9 achieving higher payments than they would receive  
10 through the process of setting the rate.

11           Q.    Well, you have had a chance in this  
12 proceeding to see the rate proposal that  
13 SoundExchange submitted back in October, right?

14           A.    Yes.

15           Q.    And is there anything in there that you  
16 can point to where you think SoundExchange is trying  
17 to trick you?

18           A.    Well, I still think it is tricky in this  
19 regard. I think saying that, for example, access to  
20 confidential information should be granted here when  
21 -- because other businesses provide this type of  
22 information, we're not in those other businesses.  
23 We're not in the business of -- we're most similar  
24 to broadcast radio. Broadcast radio doesn't provide  
25 the type of data you are requesting from us.

1                   And so it seems innocuous to say other  
2 people provide. Those other people are not in the  
3 business we're in. And so I do think that's  
4 "tricky."

5           Q.   How would proposed changes to the  
6 confidentiality regulations effectively result in  
7 Music Choice having to pay more under the statutory  
8 license?

9           A.   Okay. Well, it won't directly, but  
10 providing data access to the companies that are  
11 trying to find leverage against Music Choice, it  
12 wouldn't directly in the audio side necessarily, but  
13 I can tell you very cleanly that in our negotiations  
14 on the video side, it is expressed routinely to me  
15 that we need to pay more for video than other  
16 players because we're not paying enough in audio.

17                   So if I give more audio information, I'm  
18 -- you know, they can just twist that further.

19           Q.   Well, those -- you are not talking about  
20 negotiations with SoundExchange, right?

21           A.   No, I'm talking about the owners of  
22 SoundExchange.

23           Q.   Well --

24           A.   UMG, Sony, Warner.

25           Q.   They are not owners but you are talking

1 about members of SoundExchange, record companies?

2 A. Well, I think you know they are more than  
3 members. They -- they sit on the board. They are  
4 the ones that control policy at SoundExchange. And  
5 so their -- they overtly, in conversations with me  
6 directly, will routinely state that we have to pay  
7 in essence a penalty for video because we're not  
8 paying enough on audio.

9 Q. Right. So the record companies think  
10 that the PSS rates are too low is what you are  
11 saying, right?

12 A. Yes.

13 Q. Now, what confidential information do you  
14 currently provide to SoundExchange in the ordinary  
15 course of business?

16 A. In the ordinary course of business?

17 Q. Right, to administer the PSS license.

18 A. Well, things like our revenue, things  
19 like our playlists.

20 Q. Right. So you provide a statement of  
21 account every month, correct?

22 A. Yes.

23 Q. And that has your topline revenue on it,  
24 right?

25 A. Yes.

1 Q. And that's the monthly information that  
2 SoundExchange gets, right, along with the music you  
3 played, right?

4 A. Yes.

5 Q. And you're aware SoundExchange's -- and  
6 that's the only confidential information you provide  
7 to SoundExchange on a monthly basis, right?

8 A. I'm -- well, that's -- I believe that's  
9 the main information. I don't want to say  
10 absolutely that's all. I am not familiar with --

11 Q. But you can't think of any sitting here  
12 now, can you?

13 A. No.

14 Q. You are aware SoundExchange is proposing  
15 a per-subscriber rate in this case, right?

16 A. Yes.

17 Q. And that would require you if that were  
18 adopted, if a per-subscriber rate were adopted, that  
19 would just require you to provide your number of  
20 subscribers to SoundExchange, right?

21 A. Yes, which is confidential information.  
22 That's -- that would be valuable information to a  
23 competitor and valuable information to a record  
24 company.

25 MR. FREEDMAN: Your Honor, I would like

1 to request we go into restricted session, I think  
2 for the last time of this examination, one more  
3 section to cover.

4 JUDGE BARNETT: Okay. We will close the  
5 hearing room briefly.

6 (Whereupon, the trial proceeded in  
7 confidential session.)

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1 O P E N S E S S I O N

2 REDIRECT EXAMINATION

3 BY MR. FAKLER:

4 Q. Mr. Del Beccaro, you were just asked  
5 about direct licensing again and, you know, couldn't  
6 Music Choice direct license less than 100 percent of  
7 the music, so rely on both the statute and direct  
8 licenses, right?

9 A. Yes.

10 Q. Now, the PSS rate is calculated on a  
11 percentage of the revenue of Music Choice's revenue  
12 from the PSS, right?

13 A. Correct.

14 Q. So if you went out and negotiated direct  
15 licenses for a portion of the music you play,  
16 wouldn't you still have to pay the entire percentage  
17 of revenue on PSS plus whatever royalty you had to  
18 pay under the direct license?

19 A. As far as I know.

20 Q. And when you were discussing as counsel  
21 put it allocation of costs and revenue in the  
22 financial schedules that you submitted --

23 A. Yes.

24 Q. -- just to be clear, when you created  
25 those figures of what it would cost to do the

1 audio-only service, for example, did you allocate in  
2 the sense of looking at each cost and saying:  
3 80 percent goes to audio, 20 percent goes to  
4 something else or did you, rather, look at each cost  
5 and each headcount, each person in the department  
6 and say: Would they be needed if we were  
7 audio-only?

8 A. The latter. We -- we structured the  
9 entire analysis on what would be required to run an  
10 audio-only business.

11 MR. FAKLER: That completes my redirect.  
12 Thank you.

13 JUDGE BARNETT: Thank you, Mr. Fakler.  
14 Thank you, Mr. Del Beccaro. You may step  
15 down.

16 THE WITNESS: Thank you.

17 MR. FAKLER: Music Choice calls Damon  
18 Williams. We will get Mr. Williams.

19 JUDGE BARNETT: Thank you.

20 MR. FREEDMAN: Your Honor, I don't think  
21 you have met yet our colleague Kendall Turner, who  
22 will be handling this cross-examination.

23 JUDGE BARNETT: Nice to meet you,  
24 Ms. Turner.

25 MS. TURNER: Nice to meet you.



1 JUDGE BARNETT: Mr. Williams, please  
2 raise your right hand.  
3 Whereupon--

4 DAMON WILLIAMS,  
5 having been first duly sworn, was examined and  
6 testified as follows:

7 JUDGE BARNETT: Please be seated.

8 DIRECT EXAMINATION

9 BY MR. FAKLER:

10 Q. Good afternoon, Mr. Williams.

11 A. Good afternoon.

12 Q. Could you please state your name for the  
13 record?

14 A. Damon Williams.

15 Q. And where are you employed?

16 A. Music Choice.

17 Q. What is your current job title?

18 A. Senior vice president of programming  
19 strategy and partnerships.

20 Q. How long have you held that position at  
21 Music Choice?

22 A. Since July of 2015.

23 Q. If you would please turn to tab 56 in  
24 your binder. And let me know if you recognize that  
25 document?

1           A.    Yes, this is my written direct testimony.

2           Q.    And if you turn to the final page.  Is  
3 that your signature?

4           A.    Yes, that is my signature.

5                   MR. FAKLER:  Your Honors, I would offer  
6 into evidence Trial Exhibit 56.

7                   MS. TURNER:  No objection.

8                   JUDGE BARNETT:  56 is admitted.

9                           (Joint Exhibit Number 56 was marked and  
10 received into evidence.)

11 BY MR. FAKLER:

12           Q.    Now, Mr. Williams, in preparing for your  
13 testimony today, did you find any minor errors in  
14 this document?

15           A.    Yes.  There were two errors.  First up,  
16 Jason Derulo, who was noted on the artist visit  
17 list, is actually a recording artist for Warner  
18 Brothers Records, not Atlantic Records.

19                   And also in the exhibit where I talk  
20 about how we compare to radio, the audience metric  
21 should be our weekly listening, not monthly  
22 listening.

23                   JUDGE FEDER:  Can you direct us to the  
24 page numbers?

25 BY MR. FAKLER:

1           Q.   Absolutely.  Let's start with the written  
2 direct because I believe the Jason Derulo issue  
3 involves the rebuttal testimony, which we haven't  
4 gotten to yet.

5                   So if you take a look at page 12 of your  
6 written direct testimony.  Towards the top of the  
7 middle paragraph, is that the 3.5 million you were  
8 just talking about?

9           A.   Yes, it is.

10          Q.   And so you were saying that it should --

11                   JUDGE BARNETT:  That's restricted.

12                   MR. FAKLER:  Right now I am doing it.

13                   JUDGE STRICKLER:  But it had no context.

14                   MR. FAKLER:  That's true.

15                   JUDGE BARNETT:  Yes.  The number --  
16 before we identify what the number is, maybe we  
17 should just close the room for a moment.

18                   MR. FAKLER:  Just for a moment.  With my  
19 apologies.

20                   (Whereupon, the trial proceeded in  
21 confidential session.)

22

23

24

25

1 O P E N S E S S I O N

2 BY MR. FAKLER:

3 Q. If you turn to tab 58, do you recognize  
4 this document?

5 A. Yes, this is my rebuttal testimony.

6 Q. And if you turn to the last page, is that  
7 your signature?

8 A. Yes, that is my signature.

9 Q. And in connection with your written  
10 rebuttal testimony, you included a chart of audience  
11 visits; is that right?

12 A. Yes, I did.

13 Q. And is that the chart where Jason Derulo  
14 was listed as an Atlantic artist?

15 A. Yes.

16 Q. And who is actually Jason Derulo  
17 affiliated with?

18 A. Jason Derulo is actually affiliated with  
19 Warner Brothers Records, which is owned by Warner  
20 Music Group, which owns Atlantic Records and Warner  
21 Brothers.

22 Q. Thank you very much.

23 JUDGE BARNETT: Where is the chart?

24 MR. FAKLER: Oh, it is one of the  
25 exhibits.

1 BY MR. FAKLER:

2 Q. Would you turn to Exhibit Number 961,  
3 which is already in evidence. Is this the chart in  
4 which you, for example, if you look at the 2014  
5 listings?

6 A. Yes, this is the chart.

7 Q. Oh, okay. So to the extent on certain of  
8 these entries Jason Derulo is listed as an Atlantic  
9 artist, that's what you would like to correct?

10 A. Yes.

11 JUDGE FEDER: Mr. Fakler, have you  
12 offered Exhibit 58 in?

13 MR. FAKLER: Thank you. At this time I  
14 would like to offer 58 into evidence.

15 MS. TURNER: No objection.

16 JUDGE STRICKLER: Why don't you take the  
17 day off tomorrow?

18 MR. FAKLER: I will take that under  
19 advisement, Your Honor.

20 JUDGE BARNETT: 58 is admitted.

21 (Joint Exhibit Number 58 was marked and  
22 received into evidence.)

23 JUDGE BARNETT: Am I to understand that  
24 961 is --

25 MR. FAKLER: Already admitted.

1 JUDGE BARNETT: -- an attachment?

2 MR. FAKLER: It is already admitted  
3 pursuant to the bulk.

4 JUDGE BARNETT: Thank you.

5 BY MR. FAKLER:

6 Q. Mr. Williams, what are your job  
7 responsibilities at Music Choice?

8 A. My job responsibilities at Music Choice  
9 are to oversee our programming strategy and program  
10 initiatives as it relates to building audience  
11 tune-in for our audio channels and for our related  
12 video service.

13 I'm also in charge of working on the  
14 business strategy for how we interface with all of  
15 the major record labels, including independent  
16 labels. And I work on programs with the record  
17 labels to promote artists across our channels.

18 Q. And when did you get your first job in  
19 the music industry?

20 A. I started in the music industry in the  
21 late '80s, at a radio station in Virginia Beach,  
22 Virginia called Power 94. I was the music director  
23 for that radio station, and I worked on air play  
24 promotions with record labels.

25 Q. How many years did you spend in radio?

1           A.    About 15 years in radio before coming  
2 here.

3           Q.    And at that point did you move to Music  
4 Choice?

5           A.    Yes, I did.

6           Q.    And been there ever since?

7           A.    Yes.

8           Q.    And what was your first position at Music  
9 Choice?

10          A.    My first position at Music Choice was  
11 manager of R&B programming.

12          Q.    In the Programming Department itself?

13          A.    Yeah, inside the Programming Department  
14 itself, yes.

15          Q.    So in your testimony you use the term  
16 curated when describing Music Choice's residential  
17 audio service. Can you just briefly explain what  
18 you mean by that?

19          A.    What it means when we curate something is  
20 that we actually have a team of people that are  
21 literally listening to every song that is selected  
22 for air play on our service. Those people that are  
23 selecting the songs are actually following criteria  
24 that we have developed internally, which is our  
25 programming philosophy, and so for every song that

1 is chosen on the service, it is curated based upon  
2 one, the expertise of the person programming the  
3 music, research that we acquire around the songs  
4 that we're thinking about playing, and other  
5 dynamics in the music industry.

6           So we are a pusher of music. We collect  
7 it. We gather it. We figure out the best way to  
8 play it back to give consumers an experience. And  
9 from my perspective, that's what curation is.

10          Q. Can you explain Music Choice's curation  
11 or programming philosophy by which you are  
12 programming channels?

13          A. Sure. So our programming philosophy  
14 first kind of starts off in the human thought, in  
15 having expertise and first thinking about, okay, who  
16 is our target audience? Who are we trying to reach  
17 with this service? How do we create a unique  
18 destination for consumers to experience music?

19               As part of that process, our philosophy  
20 is to deliver that in a commercial-free format,  
21 where there is no interruptions and the music is not  
22 repetitive. So our program philosophy involves  
23 around creating a music experience that is  
24 commercial-free, that is seamless, and that is  
25 guided by a series of curation rules that we create



1 to develop, we think, what we think is a very, very  
2 unique experience.

3           We think one of the reasons why people  
4 enjoy our product is that it is curated for longer  
5 listening sessions. And we think that's one of the  
6 things that kind of separates us from other  
7 services.

8           Q. And I believe in your testimony you go  
9 into more detail and even in your exhibit, in the  
10 details of the programming philosophy. And rather  
11 than close the courtroom, we will just rely on that.

12           But can you explain how Music Choice's  
13 programming philosophy differs or differentiates  
14 Music Choice from other digital music services?

15           A. Well, I mean, I think -- I think most  
16 digital music services are interactive or on-demand.  
17 And it starts out with the idea that I'm going to  
18 select this individual song and I'm going to have an  
19 experience with that song.

20           I think the big difference between us and  
21 Digital Services, we're not using an algorithm.  
22 We're not using a series of just data points to  
23 determine how we're going to create a music  
24 experience. Again, we're actually taking people  
25 that are experts in a very specific genre, having

1   them apply an established set of rules, analyzing  
2   research to determine what is the best way to play  
3   back the music.

4                   And that's very, very different than  
5   taking a bunch of music and kind of dumping it into  
6   an algorithm based on some variables and depending  
7   on that, to play it back in an experience.

8                   So I believe the big difference is really  
9   human thought and the fact that people are actually  
10   doing it versus an algorithm.

11           Q.   And does consumer research play any role  
12   in Music Choice's programming philosophy?

13           A.   Yeah, consumer research plays a huge  
14   role. And, again, is one of the tenets of our  
15   programming philosophy. So the idea is that we need  
16   to understand who our consumers are in cable  
17   households.

18                   So we employ research from companies like  
19   Ipsos, OTX, from Nielsen, to give our programmers  
20   the tools they need to understand first who are we  
21   trying to reach. And then the second part of that  
22   is having relationships or researching within the  
23   music industry at large.

24                   I mean, you have to understand what's  
25   going on at large with the music industry as it

1 relates to even trends in music. So, for example,  
2 with the digital service, if it is a new form of  
3 music, there is no data yet. And so how are you  
4 going to like it? How are you going to start?  
5 There is nothing to go on.

6 Our team is constantly using research,  
7 whether it is formal from something like Ipsos or  
8 something that they are researching through, again,  
9 kind of the ecosystem of the music industry,  
10 determine what's the best product to put on there.

11 Q. And if you turn to tab 934 in your  
12 binder. Do you know what this document is?

13 A. Yes. This is the Ipsos OTX research  
14 study for Music Choice.

15 Q. And is this an example of the type of  
16 consumer research that Music Choice relies on that  
17 you were just discussing?

18 A. Yes, it is.

19 Q. And have you read this document before?

20 A. Yes. I'm very familiar with this  
21 document. I have not only read it, I'm part of the  
22 team that decides how are we going to put together  
23 this survey to get the best results and best  
24 research.

25 MR. FAKLER: Your Honors, at this time I

1 would like to offer Exhibit 934 into evidence.

2 MS. TURNER: No objection.

3 JUDGE BARNETT: 934 is admitted.

4 (Music Choice Exhibit Number 934 was  
5 marked and received into evidence.)

6 BY MR. FAKLER:

7 Q. Now, does Music Choice's audio service  
8 promote other revenue streams for the record  
9 companies and the artists?

10 A. Yeah. I think Music Choice's audio  
11 service absolutely promotes other revenue streams  
12 for labels in a number of ways. First of all, just  
13 through the air play. The fact that we're playing  
14 songs that is generating more awareness.

15 I think the second component that is  
16 really important is our on-screen interface. And so  
17 with our on-screen interface, we are broadcasting  
18 metadata, the artist name, the song title, the  
19 actual image of the artist that is educating  
20 consumers.

21 So if I'm a consumer, I am watching the  
22 Music Choice experience, I see a song on screen. If  
23 I search for that, typically I'm taken to a link to  
24 a service that offers a label an opportunity to  
25 generate revenue. That could be iTunes. That could

1 be Spotify. A number of different ways from  
2 watching or engaging with Music Choice. They are  
3 taken to other platforms.

4           The other way I think we do that is Music  
5 Choice is a media-based reporter, and I'm sure we  
6 will talk a lot more about that, but our air play is  
7 basically a reference point for other media  
8 platforms across the country that when they see what  
9 Music Choice is playing, they may start to consider  
10 playing that song.

11           So the more air play you have, the better  
12 opportunity that you have to monetize this.

13           Q. In your testimony you discuss your  
14 experience that Music Choice helps to break new  
15 artists. Can you briefly just explain what you mean  
16 by that?

17           A. So I have been in Music Choice for 18  
18 years. And I have had the pleasure of watching a  
19 lot of artists go from being someone that has a  
20 dream to becoming a superstar.

21           And Music Choice is typically one of the  
22 first places that an artist gets their song played.  
23 It is very, very hard to get your song placed on  
24 terrestrial radio. There is only about 40 songs at  
25 any given time that are playing on a terrestrial

1 radio station.

2 Music Choice is commercial free. And it  
3 plays more music in an hour than most media  
4 platforms. And through our programming philosophy,  
5 we have actually strategically set up where if you  
6 can think of it as slotting, we have slots that play  
7 new music.

8 And so by having more opportunities to  
9 play new music, it is achieving that goal.

10 Q. And does expert human curation give Music  
11 Choice any kind of edge over the data-driven  
12 services when it comes to breaking new artists?

13 A. Yeah. Again, absolutely. I think it  
14 does because those music experts are closer to the  
15 music, they are closer to the culture related to the  
16 music. Oftentimes you have genres of music or  
17 sub-genres of music that become popular because they  
18 started in some region of the country or some other  
19 part of the world and they make it back to the U.S.

20 Again, if you don't have that data in an  
21 algorithm, that opportunity does not exist for an  
22 interactive service to highlight that music. So in  
23 the case of Music Choice, we're finding that music  
24 first, historically we're playing that music, and  
25 not only that, you know, we have programs that

1 highlight it.

2           So, for example, we have a program called  
3 Brand New This Week, where we will highlight new  
4 songs to the platform to even highlight to consumers  
5 that there is opportunities to discover music.

6           Q.   Now, is Brand New This Week on the audio  
7 channels or part of the video package?

8           A.   Brand New This Week is on the audio  
9 channels.

10          Q.   And in your experience does Music Choice  
11 tend to break new artists before the digital music  
12 services like Pandora, Spotify, or Apple?

13          A.   Yes. I'm very confident that we're  
14 breaking music first, before the webcaster  
15 platforms. And, again, I think we're doing that and  
16 opening that opportunity for a lot of independent  
17 labels who, again, would never have a chance on  
18 terrestrial radio.

19               And the thing about a lot of the  
20 webcasters in digital platforms, the only way that  
21 you can even get a new song to them is to go through  
22 what is called a digital aggregator, someone like a  
23 Tunecore. You have to submit your song into a pile  
24 and then data is sent over to these digital  
25 platforms. Good luck with that. That's not very,

1 very easy.

2                   And at Music Choice, again, back to the  
3 human curation, we have people working in the  
4 Programming Department taking your phone calls,  
5 taking your e-mails, and interacting. And so I  
6 think that's why there is lots of examples in my  
7 testimony where you see we're not only working with  
8 major labels, we're opening up doors for independent  
9 labels.

10           Q.   And without getting into specific  
11 numbers, because we're in an open session, what  
12 kinds of investments does Music Choice have to make  
13 in order to curate its audio channels this way?

14           A.   We have to make significant investment in  
15 programming, marketing, and creative and production.  
16 So obviously you have to have experienced  
17 programmers. So not only experts in their genre,  
18 they also have to have relationships in the music  
19 industry.

20                   You have to have people that can work  
21 with the record labels. You have to have marketing  
22 people that can execute and facilitate the marketing  
23 that supports the air plays.

24                   So in my testimony, I talk about how in  
25 2013 we started doing more social media marketing.



1 That's a great example of us growing our resources  
2 in that area to do -- to do more promotion.

3 And the last part, creative production,  
4 there is a lot in my testimony about custom  
5 promotions that we do. We pay for all that  
6 production when we partner with the record labels.  
7 We have a studio and we facilitate the costs of  
8 that.

9 So there is a tremendous amount of  
10 investment to cover all of those areas, not counting  
11 all the other shiny stuff you don't see that goes  
12 with Music Choice.

13 Q. Now, how does the reach of Music Choice's  
14 audio channels compare to that of terrestrial radio?

15 A. Music Choice in most cases is larger than  
16 or comparable to most major market radio stations.  
17 And so one spin on Music Choice across the United  
18 States is more impactful than getting air play on a  
19 terrestrial radio station.

20 So in my testimony I talk about our  
21 Today's Country channel. This is the channel that  
22 has -- I am not sure if I can say the number -- but  
23 --

24 Q. Well, let's not say the number. But what  
25 we could do is turn to tab 937.

1 A. Okay.

2 Q. And maybe you can let us know if that  
3 demonstrates some of what you are talking about,  
4 without giving numbers and such.

5 A. So if everyone is on this page, you can  
6 see here a chart that is comparing Music Choice's  
7 country programming to some of the biggest  
8 terrestrial country radio stations. And you can see  
9 that our weekly audience in some cases is double the  
10 size of some terrestrial radio stations in very  
11 significant markets like Dallas, Houston, Los  
12 Angeles, et cetera.

13 So, yeah, we reach a very large audience.

14 Q. And does social media play any role in  
15 Music Choice's promotional activities?

16 A. Yeah. As I mentioned earlier in 2013, we  
17 developed a social media marketing team. And social  
18 media has become a huge complement to our audio  
19 channel programming.

20 So in the same way that our on-screen  
21 product has become a complement for giving you the  
22 artist and title of the song, we now use social  
23 media to engage our audience to let them know, hey,  
24 this song is on Music Choice or here is new music  
25 this week.

1                   So we talk a little bit about Brand New  
2 This Week. We actually have a social media hashtag  
3 at Brand New This Week, where you can follow that on  
4 social media.

5                   And the other thing that we do with  
6 social media as it ties back to our audio channels  
7 is we will create conversations with actual artists  
8 themselves in our fans. So there is exhibits in my  
9 testimony where we talk about we're doing promotion  
10 with an artist, Monday at 1:00 o'clock, and that  
11 artist is going to talk about the inspiration behind  
12 their songs.

13                  And a lot of that is promoted using the  
14 platform across social media to enhance the  
15 experience in our audio channels.

16           Q.     So you were talking about some of these  
17 individual promotions, custom promotions that you do  
18 for certain artists and recordings.

19                   Why don't we take a look at tab 938.

20                   JUDGE STRICKLER: Before we do that, can  
21 we go to 937. Good afternoon, sir, by the way.

22                   THE WITNESS: Good afternoon, Your Honor.

23                   JUDGE STRICKLER: I was just looking at  
24 the source of the information. This is comparing  
25 Music Choice's country reach to various radio

1 stations.

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: I was looking at the  
4 legend at the bottom that says music channels. This  
5 isn't restricted, I don't think. Music Choice  
6 viewer study. Was this the audio or was this video  
7 on-demand or something else?

8 THE WITNESS: This is just audio, Your  
9 Honor.

10 JUDGE STRICKLER: So even though it says  
11 "viewer study" it was an audio?

12 THE WITNESS: Yes, yes.

13 JUDGE STRICKLER: Thank you.

14 BY MR. FAKLER:

15 Q. Mr. Williams, if we turn back to  
16 Exhibit 934 and take a look at that Ipsos OTX study.  
17 Is that titled "Viewership Study"?

18 A. Yes, it is, Music Choice Viewership  
19 Study.

20 Q. Does that study, in fact, cover both  
21 audio and video for Music Choice?

22 A. This study is for audio.

23 Q. Audio only?

24 A. Yes.

25 Q. Even though they call it viewership?

1 A. Yes.

2 Q. So if we turn to tab 938. Can you tell  
3 us a little bit why you included this document as an  
4 exhibit to your testimony?

5 A. I included this document to my testimony  
6 to highlight how we recap a promotion. So whenever  
7 we are doing a custom promotion, we want to have  
8 metrics of success to it. We want to be able to  
9 demonstrate internally and externally that the  
10 promotion reached the goals that were set by Music  
11 Choice and in this case Five Finger Death Punch.

12 So the recap here is walking you through  
13 all the investment that we made in the promotion  
14 across the music channels, the audience that we  
15 delivered for the group in this case, and this is  
16 something that we can use internally, but also the  
17 record label can use to go back and measure, you  
18 know, the promotion that they did with us.

19 Q. And if we turn to Exhibit 939, this is  
20 this an answer of the Brand New This Week program  
21 you were talking about before?

22 A. Yes, it is.

23 Q. And I think that you mentioned Brand New  
24 This Week was an example of a type of promotion that  
25 you do that has a tie in to social media?

1 A. Yes, it is.

2 Q. So if we take a look at tab number 940.

3 Can you please tell me what this is?

4 A. The tab here on 940, these are  
5 reproductions of actual screen shots from social  
6 media platforms where we are cross-promoting our  
7 artist promotion from the audio channels back to  
8 social media or from social media back to our audio  
9 channels.

10 And in this case, this is a screen shot  
11 of an artist actually thanking us for adding their  
12 song on to our Brand New This Week playlist.

13 Q. And were you personally involved in  
14 collecting these examples?

15 A. Yeah. Well, I collected these examples  
16 from programming staff as part of my testimony, but  
17 I am very familiar with this. So any time we do a  
18 promotion like this, we recap this. We review it.  
19 In the case of social media, a lot of times we're  
20 doing it in realtime because this stuff is actually  
21 really, really happening.

22 So, yeah, this is stuff that I collected  
23 from the programming staff and stuff that I  
24 typically look at on a day-to-day basis when we're  
25 doing promotions.

1                   MR. FAKLER: Your Honors, at this time I  
2 would like to offer Exhibit 940 into evidence.

3                   MS. TURNER: Then, Your Honors, we object  
4 to the admission of this exhibit. It is clearly  
5 hearsay. We don't know if the artist themselves  
6 wrote this or if their staff wrote it.

7                   Mr. Williams admitted he doesn't receive  
8 these in the ordinary course of business but he  
9 collected them specifically for this proceeding and  
10 from staff. He didn't collect them himself. So we  
11 object to it on both those bases.

12                  MR. FAKLER: Your Honor, first of all, if  
13 I may respond, SoundExchange waived any hearsay  
14 objection to this exhibit. Hearsay was not listed  
15 on the joint trial exhibit submission.

16                  So the hearsay, you know, isn't there at  
17 this point. And I do believe that --

18 BY MR. FAKLER:

19                  Q. Mr. Williams, you do see these on a  
20 regular basis as part of your job, right?

21                  A. Yeah. What I said previously, I see  
22 these on a daily basis. Any time that we're doing a  
23 promotion, these are actually happening in realtime  
24 live on our social media platforms, not just the  
25 artist's platforms. So, of course, I'm seeing them

1 in realtime because they are happening on something  
2 that we're doing on the network. And I'm overseeing  
3 the strategy for network.

4 Q. But with respect to these particular  
5 ones, you personally collected them from Music  
6 Choice, they came from Music Choice's records.

7 Do you have any doubt as to what these  
8 are, whether you know what these are?

9 A. I don't have any doubt to what these are.  
10 And these came specifically from Music Choice.

11 JUDGE BARNETT: The objection is  
12 overruled. 940 is admitted for whatever weight it  
13 might have.

14 (Music Choice Exhibit Number 940 was  
15 marked and received into evidence.)

16 MR. FAKLER: Thank you, Your Honor.

17 BY MR. FAKLER:

18 Q. Now, in your testimony you discuss  
19 companies called BDS and Mediabase, right?

20 A. Yes.

21 Q. So can you explain to us what those  
22 companies are?

23 A. Sure. So BDS or Broadcast Data Systems  
24 and Mediabase are third-party companies that track  
25 air play of terrestrial radio stations and satellite



1 radio stations across the U.S., and in the case of  
2 Mediabase, also in Canada.

3 Q. And why is Mediabase and BDS reporting so  
4 important?

5 A. BDS and Mediabase reporting are so  
6 important because they are the chart of record, so  
7 to speak, for air play across the country. They  
8 actually capture the data points that the music  
9 industry uses to determine chart placement across  
10 every music format.

11 And so when you hear something, you know,  
12 you are watching the Grammy awards and somebody  
13 says: Hey, I had a Number 1 record and I won a  
14 Grammy. Well, it is coming from the charts. And so  
15 BDS and Mediabase are critically important to the  
16 music industry ecosystem because they are what  
17 drives promotional efforts by the record labels.

18 Q. And as between Mediabase and BDS, is any  
19 one more important than the other?

20 A. Yeah, Mediabase is more important than  
21 BDS. At this time Mediabase has been the most  
22 adopted monitoring platform by all of the major  
23 record labels. It is the one that they use on a  
24 daily basis to monitor air play and to drive  
25 promotions.

1           Q.    Now, was Music Choice always tracked by  
2   Mediabase and BDS?

3           A.    No.   Music Choice first got monitored by  
4   BDS in 2001; and first started getting monitored by  
5   Mediabase in 2013.

6           Q.    So starting with BDS, how did it come  
7   about that Music Choice eventually got added to that  
8   system?

9           A.    Yeah.   I was approached by Mark Tindle,  
10   who at the time was the senior vice president and  
11   general manager of BDS.   And he was getting asked by  
12   record labels how come Music Choice's air play was  
13   not included in BDS monitoring?

14                   And so he did a survey of several music  
15   executives, and it was determined that Music Choice,  
16   much like radio, it should be added into the BDS  
17   monitoring.   And so in 2001 we started off with like  
18   ten of our most radio-liked formats being monitored  
19   by BDS.

20           Q.    And later on, how did it come about that  
21   Music Choice got added to Mediabase?

22           A.    Really the same way.   So as I said,  
23   Mediabase has over time kind of become the monitor  
24   of records, become more popular than BDS.   So after  
25   proving our value on BDS, same scenario, record

1 labels wanted to have Music Choice's air play now  
2 included in Mediabase because they saw air play as  
3 being valuable.

4           And so the question is why did they see  
5 our air play being valuable? They see our air play  
6 being valuable because, again, it is very hard to  
7 get a song played on terrestrial radio. A record  
8 label in any given week may have ten new songs  
9 coming out in a format. Well, the way radio was  
10 played, there is only a certain amount of spots  
11 every week to add songs to a playlist.

12           And so there is too many songs and not  
13 enough slots, you need to find other platforms to  
14 play your songs on. And so they knew from BDS by  
15 having Music Choice as part of the Mediabase  
16 reporting platform that our spins would, one, start  
17 credibility or start the story for a new record and  
18 they would give other radio stations the incentive  
19 to consider playing new music.

20           Q.   And what other music services are tracked  
21 by Mediabase, for example?

22           A.   It is only terrestrial radio and  
23 satellite radio. So Music Choice and XM/Sirius  
24 representing on the satellite radio side and the  
25 rest is just terrestrial radio.

1           Q.    So no other digital music services like  
2 Pandora or Spotify?

3           A.    No.  There are no digital services  
4 monitored by these platforms.

5           Q.    And do you know how BDS and Mediabase  
6 select which radio stations and which services to  
7 track?

8           A.    Yeah, they look at your market size and  
9 your audience size, and, again, your impact on the  
10 music industry ecosystem.  They want to know that  
11 your platform matters and so they actually add and  
12 drop stations all of the time.

13                   And so it is very impressive that Music  
14 Choice has been consistent since 2013.  So the only  
15 way they add radio stations is if they have enough  
16 audience size and their air play is going to matter  
17 to the record labels.

18           Q.    How do the record companies use that  
19 reporting from BDS and Mediabase in their  
20 businesses?

21           A.    They use it daily to drive their  
22 promotional decisions.  And so the way to think  
23 about it is if a record label is starting to get air  
24 play in a local market in Texas on a brand new  
25 artist, they are likely going to make the decision

1 to shift marketing resources to that marketplace to  
2 try to build more momentum.

3           So they use it as part of their marketing  
4 and promotional analysis to determine how they are  
5 going to invest their resources. And just quickly,  
6 again, I think this is why Music Choice is valued on  
7 that chart.

8           When we play a song, we're a national  
9 service. And so if you only have a terrestrial air  
10 play in one or two markets and suddenly Music Choice  
11 adds you to their playlist, now you have got 50  
12 markets and now a record label can use that story to  
13 help try to garner more air play.

14          Q. And do the labels ever advertise the fact  
15 that their songs have been added or increased on  
16 Music Choice?

17          A. Yes, they do all the time. And so the  
18 record labels will advertise in music industry trade  
19 publications, e-mail blasts, you will see things  
20 like here is the channels that are playing this  
21 first. And they will actually call out Music Choice  
22 by name and sometimes even take testimonials from us  
23 about the air play.

24          Q. And if you take a look at tab 948, which  
25 was an exhibit to your written testimony. Can you

1 tell me how you went about putting this, these  
2 documents together and what they are?

3           A.    Okay.  First what these are, these are  
4 actual advertisements that major record labels have  
5 sent out to do a couple of things.  One, in some  
6 cases, they are announcing the record, the artist  
7 and title, and then you will see here on the second  
8 page, you are seeing early leaders, Music Choice,  
9 KCSN.

10                   So what they are saying to the entire  
11 field of radio stations across the country is these  
12 are the stations that are playing these songs first.

13                   And so they want everyone to know that,  
14 so they can use that to try to garner more air play.  
15 Some of these other documents in here are what we  
16 call tip sheets or hot sheets, where a record label  
17 will e-mail out to a radio station or the Music  
18 Choice information that might influence the way we  
19 would program.

20                   So I'm on the example for the artist  
21 Chinx and the album "Welcome To JFK."  There is no  
22 page number associated but using this as an example,  
23 you can see that the record label is advertising  
24 obviously the artist and title, but they are also  
25 telling you what radio stations are already playing

1 this song and how many times they are playing it.

2 And they are giving you a list of  
3 accomplishments from the artists. They already have  
4 22 million YouTube views. We're sending them on  
5 tours, the fans love them, et cetera, et cetera.

6 The point is they are using this  
7 advertisement to communicate a story about this  
8 artist and this song that would influence Music  
9 Choice to play the song, if we're not already  
10 playing it.

11 Q. And in your time working at Music Choice,  
12 have you seen these types of documents throughout  
13 that whole time?

14 A. Yeah, I have seen these kind of documents  
15 not only throughout my time at Music Choice, but  
16 throughout my whole career. This is just part of  
17 the promotional process that record labels undergo  
18 when they are promoting a record on a daily or  
19 weekly basis.

20 Q. And what did you do to collect these  
21 examples?

22 A. A couple of things. A couple of these  
23 examples are directly to me that I received through  
24 e-mail. Some of these examples I had my staff or  
25 people on the programming staff collect from

1 industry trade magazines, e-mail, different sites.

2 Q. And as you look at the document that you  
3 had put together, do you have any doubt as to what  
4 this is or your familiarity with it?

5 A. I'm very familiar with this. And I have  
6 no doubt to what this material is at all.

7 MR. FAKLER: At this time I would offer  
8 Exhibit 948 into evidence.

9 MS. TURNER: We would object on  
10 foundation and hearsay grounds. Mr. Williams is not  
11 on these e-mails. He doesn't -- he has not received  
12 them himself. He doesn't receive them. He hasn't  
13 received these specific e-mails in the regular  
14 course of business. Even if he has seen documents  
15 like these, that does not mean these specific  
16 documents should be admitted.

17 JUDGE BARNETT: Mr. Fakler?

18 MR. FAKLER: Yes, Your Honor. First of  
19 all, I believe that Mr. Williams certainly can  
20 authenticate the documents. He is familiar with the  
21 types of documents. He personally was involved in  
22 retrieving them from Music Choice business records.

23 And with respect to the hearsay issue,  
24 these are being offered, first of all, they are  
25 independent speech acts. They are not offered for



1 the truth of facts asserted per se. They are  
2 offered to demonstrate the fact that they are sent,  
3 that, in fact, these record companies do advertise  
4 spins on Music Choice.

5 So the point isn't whether or not they  
6 are really were on this slide 29 X spins. The whole  
7 point is these are independent speech acts which are  
8 not considered hearsay.

9 JUDGE BARNETT: On that basis, Mr.  
10 Fakler, 948 is admitted.

11 (Music Choice Exhibit Number 948 was  
12 marked and received into evidence.)

13 MR. FAKLER: Thank you, Your Honor.

14 MS. TURNER: To clarify that's not for  
15 the truth, correct?

16 JUDGE BARNETT: Not for the truth of the  
17 matters asserted in these particular papers.

18 MS. TURNER: Thank you.

19 MR. FAKLER: Thank you.

20 BY MR. FAKLER:

21 Q. And, again, why do the labels go through  
22 the trouble of advertising these plays on Music  
23 Choice?

24 A. Because they want to either, one, have us  
25 start playing one of the songs that they are

1 advertising or they want to entice us to increase  
2 the air play on one of the songs that we're already  
3 playing. And, again, more air play is going to  
4 create more awareness, it is going to create more  
5 opportunity to monetize your music, whether it is  
6 from the purchasing of music or increased streaming.

7 And so I think it is pretty known that  
8 the more air play, the more exposure a song has, the  
9 more revenue that they are going to generate.

10 Q. If we take a quick look at tab number  
11 950.

12 A. 950?

13 Q. Um-hum.

14 A. Okay.

15 Q. Can you tell us what this document is?

16 A. This is an e-mail from a VP of promotions  
17 that I know, John McMann from Atlantic Records, to a  
18 director of programming at Music Choice, Nadine  
19 Santos. And this is talking about air play support  
20 that we gave for Coldplay.

21 And in this case John is giving Nadine an  
22 update on how the song is doing. And he is thanking  
23 her for us supporting the song. They were having a  
24 lot of trouble with this song, even though it is  
25 Coldplay. And we were one of the first outlets, not

1 only to jump on it and play it, but play it very  
2 aggressively. And so John is thanking me again for  
3 that support.

4 Q. And you have personal knowledge of those  
5 plays with Coldplay and the effect that it had?

6 A. Yeah. I have personal knowledge of the  
7 air play. I have personal knowledge of promotions  
8 that we did with Coldplay during the course of this.  
9 And I have personal knowledge and have interacted  
10 with John McMann on a consistent basis.

11 Q. And you know that that's his e-mail  
12 address, right?

13 A. Yes, it is.

14 Q. And you know Nadine Santos, right?

15 A. Yes.

16 Q. Who you got this e-mail from?

17 A. Yes.

18 MR. FAKLER: I would offer 950 into  
19 evidence.

20 MS. TURNER: Your Honors, we object again  
21 on the same bases, this is hearsay. There is a  
22 foundation problem. Mr. Williams is not on the  
23 e-mail.

24 On the basis that Mr. Fakler is asserting  
25 as grounds for foundation, we can admit any e-mail

1 he received from one of his coworkers, and I don't  
2 know what purpose this serves other than the truth  
3 of the matter asserted.

4 MR. FAKLER: Your Honor, I do think that  
5 he has established that there is no question, there  
6 is no serious objection to whether this really is  
7 what it appears to be. It has various indicia of  
8 reliability. That oftentimes can self-authenticate  
9 documents, such as recognizable corporate e-mail,  
10 addresses, and the like.

11 So I don't think there is really any  
12 question as to whether this really is an e-mail that  
13 came from Atlantic. On the other grounds, though, I  
14 would say in addition to the fact that it is offered  
15 for the fact of the thanking for the air play, which  
16 goes to intent, which is hearsay exception, it is  
17 also a statement by a party opponent, Atlantic  
18 Records, who have had a witness testify in this very  
19 case that nobody at Atlantic cares about Music  
20 Choice or does promotion on Music Choice.

21 JUDGE BARNETT: Again, 950 is admitted  
22 not for the truth of the matter but for whatever  
23 weight anecdotal evidence such as this may have.

24 MR. FAKLER: Thank you, Your Honor.

25 (Music Choice Exhibit Number 950 was

1 marked and received into evidence.)

2 BY MR. FAKLER:

3 Q. Now, Mr. Williams, have you ever been  
4 asked by a record company to stop playing one of the  
5 recordings or to lower the amount that you play the  
6 recordings?

7 A. Never in my almost 30 plus year career  
8 have I ever had anyone ask me to decrease the plays  
9 or stop playing a song. That is not our practice at  
10 all.

11 Q. Have you heard of them approaching  
12 anybody else at Music Choice to ask for that?

13 A. No, no, I have not.

14 Q. Now, do record label employees routinely  
15 acknowledge the promotional impact of Music Choice  
16 air play?

17 A. Yes, they do. Record labels acknowledge  
18 our air play in several different ways. One is  
19 obviously on a weekly basis, they are lobbying us  
20 through whether it is e-mails, phone calls, personal  
21 visits, to our office. They acknowledge the  
22 importance of our air play.

23 And I think another way to consider that  
24 is the fact that they are investing resources to  
25 bring their artists to our studios. It takes time

1 and resources to move an artist around. And the  
2 fact that they see Music Choice as a worthwhile  
3 place to bring their artist, I think, is a good  
4 example that they think it is important.

5 Q. Is there any particular department within  
6 each record label that lobbies Music Choice for air  
7 play on the channels?

8 A. Yes, Music Choice is lobbied by the radio  
9 Promotions Department at record labels; same  
10 departments that would work with terrestrial radio  
11 stations in terms of lobbying for air play.

12 Q. And is that a separate team from the team  
13 that works with digital services like Pandora and  
14 Spotify?

15 A. Yes, it is. To my knowledge, most of the  
16 record labels have digital promotional teams,  
17 digital marketing teams that interact with digital  
18 service because it is just a different platform and  
19 really a different business model.

20 And so it is an entirely different group  
21 of people.

22 Q. And does Music Choice sometimes deal with  
23 that group of people on the video side?

24 A. Not on a routine basis. You know, you  
25 may have someone because videos are delivered

1 sometimes in that format, where someone may call to  
2 check on a video, but not as respect to the audio  
3 service.

4 Q. Now, with respect to the team at the  
5 labels that work on radio promotions, the ones who  
6 actually deal with Music Choice on a regular basis,  
7 is there any connection between that team and the  
8 corporate legal team at the parent company?

9 A. Well, let me first say in my role I have  
10 the opportunity to work with both the corporate side  
11 of the record labels and the promotional side of the  
12 record labels. And to my knowledge you couldn't  
13 find two areas of one company that are further  
14 apart.

15 I have had experience where I have talked  
16 to people on the promotional side about something I  
17 might be working with someone in the corporate side,  
18 they don't even know the people, they don't know  
19 their roles. They are very, very, very separate  
20 with the corporate side being very disconnected from  
21 what happens on the day-to-day basis as it relates  
22 to artist promotion and air play.

23 Q. And as far as the lobbying of Music  
24 Choice for air play, how does that take place? Does  
25 it take place through e-mail, on phone calls, in

1 person? How does it work?

2 A. It takes place in various ways. It takes  
3 place through e-mails. It takes place through phone  
4 calls. It takes place through in-person visits to  
5 our studios. It takes place at invites, record  
6 labels will invite us out to events that are not for  
7 the public where they are showcasing their new  
8 artist.

9 And they will bring us out to hear a new  
10 artist perform before it is available to the public  
11 so that they can lobby us on playing music from the  
12 artist.

13 I mean, there is various approaches that  
14 they take in lobbying us to get air play.

15 Q. And if we take a look at Exhibits 959  
16 first.

17 A. Okay.

18 Q. Then if we look at 967. And then 969.  
19 Are these examples of e-mail lobbying activity that  
20 you included as exhibits to your direct and rebuttal  
21 testimony?

22 A. Yes. These are all exhibits of e-mail  
23 lobbying and exhibits that I'm familiar with. I am  
24 not sure if it came across when I talked about my  
25 role in the company, but a lot of times in this



1 e-mail lobbying, you are seeing the record label  
2 representative asking for a change, for us to do  
3 something to our service, whether it is increasing  
4 plays or adding a song.

5 In my role in programming strategy, I'm  
6 involved with that process of helping to make those  
7 decisions. And so I'm very familiar with this  
8 e-mail and I'm very familiar with these practices.

9 Q. And do the programmers often come to you  
10 with these e-mails and say I'm being asked for more  
11 plays, what should we do?

12 A. Exactly. And that's what I was trying to  
13 articulate. Oftentimes the programmers come to me  
14 and we actually have a conversations about how we're  
15 going to handle these requests. Just because  
16 someone makes a request doesn't mean that we always  
17 comply.

18 And so sometimes we have to be thoughtful  
19 about how we're going to respond to these requests.  
20 So I'm often on a daily basis part of that process  
21 that you are seeing here.

22 Q. To create these exhibits, you personally  
23 reached out to these programmers and collected these  
24 example e-mails to include with your testimony?

25 A. Yes, I did.

1           MR. FAKLER: Your Honors, I would offer  
2 into evidence Exhibits 959, 967, 969 on the same  
3 basis as being not for the truth of any facts  
4 asserted, merely to demonstrate lobbying activity.

5           MS. TURNER: And recognizing that they  
6 are not for the truth of the matter asserted, we  
7 still wanted to put on the record we do object to  
8 the admission of these exhibits on the same bases,  
9 that Mr. Williams is not on any of these e-mails.  
10 It appears that many e-mails from Music Choice,  
11 other Music Choice personnel are trying to be moved  
12 in through this particular witness, even though he  
13 has no special connection to them.

14           JUDGE BARNETT: Thank you. 959, 967, 969  
15 are admitted not for the truth of the matter  
16 asserted.

17           (Music Choice Exhibit Number 959, 967,  
18 969 were marked and received into evidence.)

19 BY MR. FAKLER:

20           Q. Do the record labels also send e-mails to  
21 Music Choice thanking them for playing the music on  
22 Music Choice?

23           A. Yes, they do on a pretty routine basis.

24           Q. And I think we already saw one of those  
25 in Exhibit 950, but if you turn to Exhibit 943 and

1 949.

2 Are these examples of those sorts of  
3 "thank you" e-mails that you put together in the  
4 same manner that you put together the various other  
5 exhibits we have been discussing?

6 A. Yes.

7 MR. FAKLER: I would offer Exhibits 943  
8 and 949 into evidence.

9 MS. TURNER: Your Honors, we have the  
10 same objections again. Thank you.

11 JUDGE BARNETT: Objections noted. 943  
12 and 949 are admitted on the same basis; that is, not  
13 for the truth of the facts asserted therein, but to  
14 establish the fact of the communications.

15 (Music Choice Exhibit Numbers 943 and 949  
16 were marked and received into evidence.)

17 MR. FAKLER: Thank you, Your Honor.

18 BY MR. FAKLER:

19 Q. Now, with respect to these various  
20 e-mails we're looking at, that we have been looking  
21 at, did Music Choice ask the record companies to  
22 send any of these?

23 A. No.

24 Q. And do you -- you have received countless  
25 numbers of e-mails just like these, right?

1           A.    Yeah.  I receive countless number of  
2 e-mails like this all the time.  I believe there is  
3 some actually in the exhibit related to the Chris  
4 Brown custom promotion.  This is a daily part of my  
5 job at Music Choice.

6           Q.    And when you receive these e-mails, is it  
7 your understanding that the record companies are  
8 just sending these to be polite?

9           A.    No.  I think the record companies are  
10 sending this as a matter of course of doing business  
11 with us.  And in many cases, are partners with us.  
12 So it is not about being polite.  It is an ongoing  
13 conversation and communication.  It is not just one  
14 e-mail and done.

15          Q.    And you also mentioned plaques that the  
16 record companies send over to Music Choice?

17          A.    Yes.  So the record companies, as, you  
18 know, what I would say are closing acknowledgment to  
19 Music Choice, if we participated in the air play and  
20 promotion of a label project that achieves a certain  
21 level of success, let's say it sells 1 million  
22 units, they will acknowledge us by giving us a  
23 commemorative plaque to acknowledge that.  I just  
24 received two plaques last week for some songs that  
25 we played that sold a million copies.

1                   And so it is a very common practice that  
2 has been happening for the entirety of the time I  
3 have been with Music Choice.

4           Q.   And does Music Choice ask for these  
5 plaques?

6           A.   No, we don't. They just show up in the  
7 lobby. I have no clue.

8           Q.   And with respect to the lobbying activity  
9 that we have been talking about, let's start with  
10 the phone calls. About how many phone calls a week  
11 does the entire Music Choice programming staff get  
12 for lobbying?

13          A.   We get hundreds of calls a week. We have  
14 multiple formats of music with multiple programmers.  
15 And between major labels, independent labels, our  
16 phones are constantly ringing.

17                   In fact, they can ring so often that we  
18 actually will set specific days and times to  
19 actually receive these calls to actually manage the  
20 process. And in most cases the record labels will  
21 adhere to that so they know that Monday or Tuesday  
22 is record call day. And they will call us between  
23 certain hours of the day to communicate what their  
24 priorities are for the week. And that's how  
25 promotion works, not just at Music Choice, across

1 the entire industry.

2 Q. And how many e-mails a week would you  
3 estimate that Music Choice gets lobbying for air  
4 play?

5 A. Thousands, by the minute. Record  
6 companies are in non-stop promotion mode when it  
7 comes to pushing air play for their artists up the  
8 charts.

9 Q. Based on your experience being on the  
10 receiving end of this lobbying activity, is it  
11 possible that the marketing and promotional  
12 employees are only looking to increase the PSS  
13 royalty that the record company is getting, with  
14 that increased air play?

15 A. No. The marketing and promotional people  
16 probably don't even know what a PSS royalty is. It  
17 is just not what they do. And they are focused on  
18 air play and promotional support for whatever artist  
19 and projects they are assigned during that time  
20 period.

21 Again, as I stated earlier, I have had  
22 the opportunity to work on the corporate side of  
23 labels and also the promotional side. And there is  
24 a clear line drawn where the typical promotion  
25 executive that we work with is not knowledgeable and

1 probably doesn't even know this is happening today,  
2 for example.

3 Q. And is this lobbying activity widespread  
4 across pretty much all labels or is it specific to  
5 only certain labels?

6 A. Lobbying is widespread across all of the  
7 major labels and all of the resourced independent  
8 labels are lobbying on a weekly basis, daily basis  
9 to get their songs played.

10 Q. And what percentage of Music Choice's  
11 audio channel programming comes from independent  
12 labels that are not distributed by the Majors?

13 A. About 50 percent of our programming comes  
14 from independent record labels. Again, we are a  
15 music platform that gives independent record labels  
16 an opportunity to get exposure on a national level.

17 We have channels that are outside of just  
18 the mainstream radio formats like metal rock, for  
19 example. You can't get that on a terrestrial radio  
20 station.

21 Most of those formats are covered by  
22 independent labels. So they turn to us to get air  
23 play.

24 Q. Now, how many different independent  
25 labels, again, that aren't distributed by the Majors

1 are played on Music Choice?

2 A. It is upward 3500 plus independent labels  
3 that have product on Music Choice.

4 Q. Is that 3500 all of the labels or the  
5 label groups? Because sometimes there is more than  
6 one label owned by the same --

7 A. Yeah, in some cases, you may have an  
8 independent label that may have a distribution deal  
9 with a major label, but they are still independent  
10 in the idea that they own their master recordings.  
11 Their master recordings are not owned by the major.  
12 They are just using them for distribution.

13 Q. Now, does Music Choice's onscreen display  
14 have any impact on its promotional effect?

15 A. Yes. Music Choice's on-screen display, I  
16 think, has a huge impact on promotion. Again, I  
17 stated earlier that it is educating consumers in  
18 creating awareness for their products that the  
19 artists are having played on our service.

20 We actually dedicate about 35 percent of  
21 our promotional inventory to the record labels to  
22 promote their artists and songs across our service.

23 Q. Do you mean on-screen advertising?

24 A. On-screen advertising at no charge, about  
25 35 percent of our service is used to promote their



1 songs.

2 And that doesn't necessarily include  
3 things that we talked about earlier like Brand New  
4 This Week. We're creating custom advertising and  
5 creating awareness for those.

6 Q. And has the on-screen display changed  
7 during the time that you have been at Music Choice?

8 A. Yeah, it has. It has actually become  
9 more robust. We have been able to do more  
10 integration with artist images. We have been able  
11 to do integration with social media as we talked  
12 about. We're constantly investing in the on-screen  
13 interface to make it more engaging to consumers.

14 Q. Has the recent change in -- and without  
15 getting into specific details because we're in open  
16 testimony -- but has the recent change in Music  
17 Choice's financial performance slowed down the pace  
18 of those improvements?

19 A. Yes, it has. I mean, we haven't been  
20 able to implement a lot of the product development  
21 ideas that we have for that product because some of  
22 the challenges that we have. And so there are other  
23 things that we would like to bring to market that we  
24 think would actually help and enhance record labels'  
25 opportunity to monetize their content for music.

1           Q.   Now, you discuss a number of the custom  
2 promotions that Music Choice has done, examples for  
3 various artists recordings. And we won't go into  
4 all of those in detail. They are in your written  
5 testimony and time is getting short.

6                     But, in general, do these custom  
7 promotions ever include any additional air play on  
8 the audio channels as part of their promotion?

9           A.   Yeah, the big leap for all of our custom  
10 promotions is the audio channels. And so the way  
11 that we achieve that when we commit to a promotion,  
12 we're going to enhance the air play for the artist  
13 and label.

14                    For example, record labels will give us a  
15 grant of right against the DMCA, for example, to  
16 play a song every hour on the hour. And they have  
17 given us the right to play the entire album at a  
18 given time. So we're doing these custom promotions.  
19 We are using the audio channels as the flagship to  
20 reach the most amount of eyeballs that we can to  
21 help drive the promotion.

22           Q.   And Music Choice, has Music Choice done  
23 these sorts of custom promotions for both  
24 established artists and up-and-coming artists?

25           A.   Yeah. I mean, we do these promotions

1 with the major labels. We do them with  
2 independents. There is actually a really good  
3 example in my exhibit, I talk about an artist named  
4 Rich Homie Quan that was signed to a record label  
5 called Think It Game.

6 We were actually the first media platform  
7 to play his music before terrestrial radio. And  
8 from that in 2015 he actually ended up having the  
9 most played song on terrestrial radio on the format  
10 for that year, the most popular song. And recently  
11 he just signed a record deal with a major label.

12 So he actually went from an independent  
13 label, he was able to take that success and turn  
14 that into a signing with a major label. He is now  
15 on Capitol Records.

16 And so I actually think that's a great  
17 example of where we're using our platform, giving an  
18 independent label an opportunity because of their  
19 creativity, they found a huge amount of success, and  
20 they were able to parlay that into a deal with a  
21 major label.

22 Q. And how about an example of a big star  
23 that has also had successful promotion with Music  
24 Choice?

25 A. Yeah, there is example in here where we

1 worked with Chris Brown, who is a recording artist,  
2 on RCA Records. His management and the label  
3 actually came to us. He wanted to promote his new  
4 album during the Christmas holiday.

5 So they actually granted us the right to  
6 air five songs from his album that were never  
7 released to the public before any terrestrial radio  
8 station on our service.

9 So we took one of our channels and  
10 rebranded it Chris Brown Week and actually gave him  
11 an entire week of programming.

12 And I think the other part that was  
13 interesting about that promotion, we were actually  
14 also given custom URL links to iTunes that enabled  
15 the record label to generate revenue from sales  
16 through our social media promotion that is tied back  
17 to our audio channels. And they actually did see  
18 some downloads in sales from that promotion.

19 So that's a great example of someone that  
20 is an established superstar that was actually  
21 willing to work with Music Choice in a way that was  
22 much different than they would work with terrestrial  
23 radio or any other TV network.

24 Q. Now, with respect to these custom  
25 promotions, does Music Choice get any benefit from

1 these custom promotions?

2 A. Of course we see some benefit. We're  
3 engaging our customer base with programming and  
4 promotion, but the benefit really goes both ways  
5 between Music Choice and the record labels.

6 We're getting the benefit, you know,  
7 through the term of the promotion, which typically  
8 is a week or two weeks, but once we invest that  
9 marketing and promotion and helping to build the  
10 brand of that artist, we're helping to build the  
11 brand of that song or rather the popularity of that  
12 song, the record labels are benefitting long after  
13 us in probably, again, Rich Homie Quan, going back  
14 to that quickly, that's a great example of we're not  
15 benefitting from him being now on a major label.

16 Q. And is there any reason, does the  
17 promotional -- well, should I say does the fact that  
18 Music Choice gets some benefit out of these  
19 promotions, does that in any way decrease the value  
20 that the labels get out of the promotions?

21 A. No, not at all. I don't think it is  
22 devaluing the promotion at all. Music Choice is one  
23 part of the puzzle. It is not substitutional.

24 And so the promotion that we're giving  
25 them is adding value to their entire promotional

1 effort that they have at the time.

2 Q. And when the record companies are  
3 promoting their recordings to Music Choice, do they  
4 promote their entire catalogue all at once or do  
5 they do promotions that are related to specific  
6 artists or specific recordings?

7 A. Typically to specific artists and typical  
8 recordings. One is called a single, one single at a  
9 time.

10 Q. Right. Now, let's talk about Atlantic  
11 Records a little bit in your rebuttal testimony.

12 JUDGE BARNETT: Before we go there, Mr.  
13 Fakler, we're going to take our afternoon recess.

14 MR. FAKLER: Gee whiz, yes.

15 JUDGE BARNETT: 15 minutes.

16 (A recess was taken at 3:26 p.m., after  
17 which the hearing resumed at 3:47 p.m.)

18 JUDGE BARNETT: Please be seated. Mr.  
19 Fakler?

20 MR. FAKLER: Thank you, Your Honor.

21 BY MR. FAKLER:

22 Q. Mr. Williams, let's talk very briefly  
23 about Atlantic and your written rebuttal testimony.  
24 Did you read Mr. Kushner's written direct testimony  
25 in this proceeding?

1 A. Yes, I did.

2 Q. And has Mr. Kushner ever been personally  
3 involved in any of Atlantic's dealings with Music  
4 Choice regarding air play or promotions?

5 A. No, Mr. Kushner has never been involved  
6 with any promotional activity between Music Choice  
7 and Atlantic Records.

8 Q. And did you have any reaction to Mr.  
9 Kushner's claim that Atlantic does not view Music  
10 Choice as a major outlet for Atlantic's music?

11 A. I was very, very surprised when I read  
12 his comment. We have been working with Atlantic  
13 Records strategically since 2006 on various artist  
14 promotions across our music channels with some of  
15 their biggest stars.

16 Just most recently one of the biggest  
17 stars on their label is Ed Sheeran, actually came  
18 into our studios in New York City and did two  
19 exclusive performances for us by request of Atlantic  
20 Records prior to release of his album.

21 And, in addition to that, Atlantic  
22 Records gave us the rights to record that  
23 performance and use it across our network. So it  
24 doesn't really add up that, you know, we don't have  
25 a relationship with Atlantic Records as it relates

1 to promoting their artists.

2 Q. And has Atlantic Records, their radio  
3 promotion people, have they actively lobbied Music  
4 Choice for air play?

5 A. Atlantic Records' radio promotion team  
6 has been actively lobbying us for years now to play  
7 their records in the same way we have talked about  
8 earlier here in my testimony, phone calls, e-mails,  
9 in-office visits.

10 I mean, I was invited out to one of their  
11 events recently for one of their artists where all  
12 their top executives were there. And the purpose of  
13 me being there was about promotion.

14 Q. And does Atlantic's lobbying for air play  
15 on Music Choice, is it any less than any of the  
16 other major labels?

17 A. No. All the record labels are  
18 aggressive. And Atlantic is equally aggressive in  
19 their attempt to get their artists on. Again, I  
20 think the Ed Sheeran we talked about is a great  
21 example.

22 Another one of their biggest stars is  
23 Bruno Mars, who performed at the Superbowl recently.  
24 They brought him to our office to do promotion. And  
25 so they are very active with us.



1 Q. So they also do these custom promotions  
2 with Music Choice.

3 With respect to artist visits as you are  
4 discussing with Ed Sheeran, does that lead to  
5 additional air play on the audio channels as well?

6 A. Yes, it does. As part of that, we're  
7 featuring that artist's music across our audio  
8 channels to amplify the promotion that we're doing  
9 with Atlantic.

10 Q. And is that true for all artist visits  
11 for all labels? Does it always lead to increased  
12 air play on the audio channels?

13 A. Yeah, any time we're working with a  
14 record label on a promotion, we're working together  
15 to bring greater awareness and we're playing the  
16 song more on audio in support of that.

17 Q. And you provide a more comprehensive list  
18 and examples of these various lobbying activities  
19 and custom promotions in your written testimony from  
20 Atlantic, right?

21 A. Yes, I do.

22 MR. FAKLER: That concludes my direct  
23 examination. Thank you.

24 JUDGE BARNETT: Thank you, Mr. Fakler.  
25 Mr. Rich, I presume there is no cross from --

1 MR. RICH: That's correct, Your Honor.

2 JUDGE BARNETT: Thank you.

3 Ms. Turner?

4 CROSS-EXAMINATION

5 BY MS. TURNER:

6 Q. Hi. I am Kendall Turner representing  
7 SoundExchange and the other Copyright Owners and  
8 artists, Mr. Williams. Hi.

9 A. Hello.

10 Q. If you can open that binder we just gave  
11 you. Behind the first tab should be a copy of your  
12 written direct testimony. And if you can just turn  
13 to page 6 of that, please.

14 You state there that in order to  
15 differentiate its service -- and this is something  
16 you talked about with Mr. Fakler as well -- Music  
17 Choice must add significant creative inputs  
18 including the curation of its audio channels. Do  
19 you see that? It is like starting in the second  
20 line on page 6.

21 A. Yes, I see that.

22 Q. And when you talk about differentiation,  
23 you mean differentiation from your competitors,  
24 correct?

25 A. Well, we mean to differentiate ourselves

1 in the marketplace on TV, not just in the context of  
2 our competitors, Music Choice is primarily a TV  
3 platform delivering music on television. So --

4 Q. Right.

5 A. -- we have to make investments to make  
6 something that you listen to engaging for a TV.

7 Q. Right. So you would be trying to  
8 differentiate yourself from, among other entities,  
9 Stingray?

10 A. Well, we're differentiating ourselves  
11 from TV but, yes, we would be -- we would want to be  
12 differentiated from Stingray, that is correct.

13 Q. And when you say that Music Choice  
14 differentiates itself, you mean through curation,  
15 you mean that the curation that Music Choice offers  
16 is a central part of its value proposition, that's  
17 what sets it apart?

18 A. Yeah. I think curation, I think our  
19 on-screen experience, I think our channel lineup.  
20 And so, for example, Music Choice is a U.S.-based  
21 product. Stingray is a Canadian-based product. And  
22 so our channel lineup is different.

23 Q. Right. And we will talk about the  
24 on-screen display too.

25 But in terms of curation, if you could

1 just turn to 985, which is the next document in your  
2 binder.

3 A. Okay.

4 Q. This has already been admitted into  
5 evidence. And this is a printout from Stingray's  
6 website, correct?

7 A. Yes, this is the first time I have seen  
8 it but, yes, that's what it appears to be.

9 Q. And do you see at the bottom it says that  
10 Stingray offers thousands of channels hand-curated  
11 by a team?

12 A. Yes, I do.

13 Q. Okay. So, in other words, Stingray, like  
14 Music Choice, curates the music by hand that it  
15 offers to consumers, correct?

16 A. No, they don't.

17 Q. So this is incorrect?

18 A. If you go to Stingray's mobile device  
19 app, and this is a mobile device app advertisement,  
20 it is not a television advertising --

21 Q. Right.

22 A. -- they have a series of playlists that  
23 are constructed using data from a company that  
24 delivers metadata. And those playlists are  
25 generated from algorithms. So they have a program

1 called Vibes Channels. If you want to create a mood  
2 in your house if you are having a party, you pick a  
3 Vibe Channel based upon a genre, a mood, and a  
4 tempo.

5 Q. So there are some -- so --

6 A. Well -- well, the point I am making is  
7 that they are using an algorithm to generate their  
8 playlists. When I referenced curation in my  
9 testimony, it related to human thought, human  
10 programming, and our programming philosophy.

11 It is very, very different, exactly what  
12 I was talking about in my testimony, this is very,  
13 very different. This is a connected digital device  
14 using an algorithm to generate a playlist.

15 Q. So I am not disputing that sometimes  
16 Stingray might use algorithms, but this document  
17 suggests they do engage in some level of human  
18 curation; is that correct?

19 MR. FAKLER: Your Honor, I would like to  
20 object to the question, based on what is represented  
21 in this document, because Mr. Williams has said he  
22 has never seen this document before and he has  
23 testified based on his personal experience with the  
24 Stingray product.

25 JUDGE BARNETT: Sustained. The document

1 speaks for itself.

2 BY MS. TURNER:

3 Q. Can we talk about Music Choice's  
4 on-screen displace?

5 JUDGE STRICKLER: Before you go on,  
6 counsel, I want to make sure we have a complete  
7 document here. I recognize the first page says it  
8 is at 1 of 3 and the next page says 2 of 3. Perhaps  
9 I am missing.

10 At the very bottom where you were  
11 questioning the witness it says "thousands of  
12 channels hand curated by a team of" -- and I, with  
13 great anticipation, turned the page and I couldn't  
14 figure out --

15 MS. TURNER: It does appear to be cut  
16 off. You are correct.

17 JUDGE STRICKLER: So we don't know it is  
18 a team of -- jackals?

19 MS. TURNER: We don't know the answer. I  
20 don't know.

21 (Laughter)

22 MS. TURNER: Good question. We can  
23 substitute a new version, if you like.

24 BY MS. TURNER:

25 Q. So you mentioned Music Choice's on-screen

1 displays is another part of its value add. If you  
2 could turn to page 11 of your written direct  
3 testimony now, please.

4 A. Okay.

5 Q. You will see a header B. And in the  
6 second sentence under that header you explain that  
7 the on-screen display that Music Choice offers  
8 features key marketing information, such as the  
9 artist's name and album title, artist facts, album  
10 artwork, artist images. Do you see that?

11 A. Yes, I do.

12 Q. Great. Now, Stingray has on-screen  
13 displays as well on AT&T U-verse, correct?

14 A. I have never seen this product on AT&T  
15 U-verse.

16 Q. Do you know if Stingray has an on-screen  
17 display?

18 A. Yes, I do.

19 Q. And that on-screen display reflects the  
20 artist name and album title?

21 A. Yes, it does.

22 Q. And it also reflects album artwork?

23 A. That I'm not aware of.

24 Q. Okay. And do you know about artist  
25 images or artist facts?

1 A. That I'm not aware of.

2 Q. Okay.

3 A. But I would say that our artist facts are  
4 proprietary to us.

5 Q. Right. There might be different artist  
6 facts. Of course you have your own.

7 A. Right.

8 Q. So if we can now turn to another topic  
9 and just turn to the next page, page 12 of your  
10 written direct testimony. And you talked about this  
11 a little bit with Mr. Fakler as well.

12 You mentioned that Today's Country  
13 reaches more people than many popular terrestrial  
14 radio stations, correct?

15 A. Yes.

16 Q. And the number is restricted, so if we  
17 could -- yeah.

18 Now Today's Country is one of Music  
19 Choice's most popular stations, correct?

20 A. Yes, it is.

21 Q. And most -- that means that most of Music  
22 Choice's other channels would have a lower  
23 listenership, correct?

24 A. You mean amongst the 50 channel lineup?

25 Q. Yeah.



1           A.    Or are you talking about the channels  
2 that are monitored by Mediabase? It is two separate  
3 things. So most of the formats that we have that  
4 are in comparison to terrestrial radio, like  
5 mainstream pop, hot AC, hip-hop, and R&B are  
6 actually larger.

7           Q.    They are larger, okay.

8                    So -- but if you can turn to 937, which  
9 is also in that binder, but you also looked at with  
10 Mr. Fakler earlier as well.

11          A.    Okay.

12          Q.    So it has already been admitted into  
13 evidence.

14          A.    Okay.

15          Q.    So you are saying that pop has higher  
16 listenership?

17          A.    Yeah, well in this binder you are seeing  
18 Today's Country, which is the equivalent of  
19 mainstream country at terrestrial radio. You are  
20 seeing Country Hits, which is not really a  
21 terrestrial radio format.

22                   Country Hits is a catalogue-based channel  
23 that merely plays what we call recurrent songs or  
24 you would call older songs. And Pop Country is not  
25 a terrestrial radio format. That's a format that we

1 created from our research that combines the best  
2 elements of pop music and country music on one  
3 channel. You can't find that on --

4 Q. Right, there is not a comparable  
5 terrestrial radio station?

6 A. Right, right.

7 Q. But Today's Country you are saying is one  
8 of the most popular channels that Music Choice  
9 offers?

10 A. Yes, it is. I said that.

11 Q. And I just have a few questions about  
12 this graph. So if this is one of the most popular  
13 stations that Music Choice offers, do you know how  
14 many channels Music Choice offers that are less than  
15 these popular radio stations, have viewership less  
16 than these popular radio stations?

17 A. If I was looking at our, judging this off  
18 our core 50 channel lineup, there is probably 30 to  
19 35 channels that have smaller audience than this on  
20 a weekly basis.

21 Q. Okay. Thanks.

22 And last question about this document.  
23 If you could look at the footer, which I think Judge  
24 Strickler had asked about earlier, you will see that  
25 the data for the Music Choice channels are from July

1 and the data for the terrestrial radio stations are  
2 from December.

3 A. Yes.

4 Q. Do you know if listenership has a  
5 seasonality? Is it higher in the summer?

6 A. Listenership does historically have a  
7 seasonality. It depends on the platform, whether it  
8 is higher in the summer. And in this case Nielsen  
9 is using December.

10 And so actually if you look at  
11 terrestrial radio listening during the holiday  
12 season, it is actually higher. And so it is pretty  
13 common in most studies that are out there.

14 Q. Okay. But we don't -- we don't actually  
15 know if July and December are necessarily comparable  
16 for Music Choice to terrestrial radio?

17 A. No, we don't. We don't know that.

18 Q. Okay. I want to talk now a little bit  
19 about Music Choice's promotional value. If you  
20 could turn to page 12 of your written direct  
21 testimony again.

22 At the very bottom to the top, you talk  
23 about how artists and record labels continue to  
24 benefit from Music Choice initiatives.

25 A. On page 12?

1 Q. Yeah. It is at the sentence that carries  
2 from 12 to 13. If you don't see it --

3 A. I'm sorry.

4 Q. I mostly want to talk about you give by  
5 way of illustration the Five Finger Death Punch  
6 example you had talked about earlier.

7 A. Okay.

8 Q. And you chose this example because you  
9 think it is especially indicative of Music Choice's  
10 promotional value, correct?

11 A. Yes.

12 Q. And could you please turn to page or to  
13 Exhibit 938. There is a little purple tab that is  
14 the page that I would like to talk about.

15 A. Okay.

16 Q. And do you see the second sentence says  
17 that Music Choice felt that if it had been allowed  
18 to premier this album of Five Finger Death Punch the  
19 same day as Pandora and Sirius XM, it would have had  
20 a higher level of engagement. Do you see that?

21 A. Yes.

22 Q. Who didn't allow you?

23 A. Well, this promotion is not billed as an  
24 exclusive promotion. It is billed as a Five Finger  
25 Death premier. And so we're premiering this

1 promotion on our platform. I think what our recap  
2 is saying is if we were first to the marketplace, we  
3 would have been the first one to, to draw attention  
4 to say that we have something.

5 I don't know that the situation is who  
6 allowed us to or that we were in competition. I  
7 don't think either one of these platforms, Pandora  
8 and Sirius XM, had an exclusive. It is just a  
9 matter of whether they were able to put the  
10 promotion on air.

11 Q. So they did -- but Pandora and Sirius XM  
12 did premier the album before Music Choice?

13 A. Yeah, which is, which is typical. And so  
14 --

15 Q. So the band or their label made the  
16 decision that they would rather premier on these  
17 services instead of Music Choice?

18 A. No, I don't know that. I don't know that  
19 they consciously said hey, we want to do this on  
20 these platforms. It could just be when the  
21 promotion came together. I don't know that it is  
22 because one was preferred or other.

23 I don't even know the elements of what  
24 Pandora and Sirius XM did, but, again, those are two  
25 very different platforms. Pandora being a digital

1 platform --

2 Q. But it looks like if the band had wanted  
3 to premier on Music Choice before Pandora and Sirius  
4 XM, it would have been able to?

5 A. Can you say that again?

6 Q. If the band had wanted to premier on  
7 Music Choice before Pandora and Sirius XM, it would  
8 have been able to, correct?

9 A. Yeah, we don't control their recordings.  
10 It is their decision who they want to do that with.

11 Q. And Five Finger Death Punch, not the most  
12 prominent band in the marketplace?

13 A. I'm not sure what you mean by that.

14 Q. It is not a household name? It is not  
15 like Adele or Taylor Swift?

16 A. See, we can't really look at things just  
17 in that way. Music Choice has 50 different channels  
18 of genres in music. And we have consumers that are  
19 passionate about each and every genre of music.

20 I'm sure that the rock fans that love  
21 Five Finger Death Punch aren't Beyonce fans. We  
22 don't look at it that way. They are important to  
23 their genre and their style of music. And their  
24 audience is on our platform so we don't process it  
25 in that way.

1 Q. Okay, I take your point.

2 And if you look back at the document,  
3 though, it says if the opportunity arises, Music  
4 Choice would also love to support your artists with  
5 exclusives. And then it thanks the album for  
6 allowing Music Choice to premier the album. So it  
7 thanks the artists for --

8 A. I'm sorry, can you tell me what page you  
9 are on?

10 Q. Same page, just the next two sentences.

11 A. Okay.

12 Q. So in this instance Music Choice is  
13 asking to band for promotion, not vice versa?

14 A. No, we're not asking them for any  
15 specific promotion. This is just normal -- it is  
16 the same thing as the record label saying, hey,  
17 thank you. We're just being courteous.

18 We completed a promotion and we're just  
19 saying to them, hey, we would love to work with you  
20 and support you more. I don't characterize --

21 Q. So the e-mails that you were talking  
22 about with Mr. Fakler, you would differentiate those  
23 on what grounds?

24 A. The e-mails that I just -- that -- you  
25 have to explain your question to me.

1 Q. Yeah, sure. So you are saying that this  
2 is just, you know, courtesy, like this is common  
3 practice in the industry?

4 A. Yeah, as the same thing I said about Mr.  
5 Fakler's e-mails, he asked me were they, were people  
6 sincere when they said it, yeah, it is just a matter  
7 of practice of doing business.

8 Q. Right. Okay. So let's turn to a  
9 different, slightly different topic.

10 If you could turn to page 17 of your  
11 written direct testimony, please. Just a quick  
12 question that I have. You don't have to even look  
13 at your testimony.

14 A. Okay.

15 Q. You mention there that Music Choice has a  
16 video on-demand service and then that's another part  
17 of its promotional value add. Correct?

18 A. Yes.

19 Q. And Stingray also offers a video  
20 on-demand service, correct?

21 A. Yes, they do.

22 Q. Okay. And then can you turn to the next  
23 page, please. You say that you know that playing  
24 music on Music Choice residential service drives  
25 record sales. Do you see that?



1 A. Yes.

2 Q. Okay, great. Do you provide any data to  
3 support that assertion in your testimony?

4 A. We actually used to do studies years ago.

5 Q. But in your testimony --

6 A. Definitely linked -- in my testimony,  
7 there is actually an exhibit in the Chris Brown  
8 exhibit that talks about how RCA Records gave us an  
9 iTunes link and the results of that promotion. And  
10 it will show you that records were sold.

11 Q. That's for Chris Brown?

12 A. Well, the question you asked me was did  
13 our service drive sales.

14 Q. Yeah.

15 A. So I am just pointing to that as an  
16 exhibit to my testimony that there is example of  
17 where we drove sales from a promotion.

18 Q. Okay. And Music Choice tends to start  
19 playing songs or albums roughly at the same time  
20 they are released into the market, maybe a few weeks  
21 delayed but roughly?

22 A. We play songs faster than the market, the  
23 complete opposite.

24 Q. Okay.

25 A. When a song is released, the record label

1 releases a song out to the marketplace, not every  
2 outlet immediately makes that song available.

3 Q. I misspoke. I meant to say that you  
4 start to play an album roughly after it is released?

5 A. Yes.

6 Q. And as a general matter, sales go up  
7 after a release?

8 A. I think historically more air play lends  
9 to more sales or more streams of music. So when you  
10 look at the most artists that are selling the most  
11 records or the artists that are streaming the most  
12 music in those metrics today are really combined,  
13 those are the artists that are achieving the most  
14 air play, so yes.

15 Q. Okay. And you haven't made an effort,  
16 though, to quantify how much of the increase in  
17 sales is attributable to Music Choice as a general  
18 matter?

19 A. Well, as I was saying earlier, we have  
20 done studies in the past that have correlated Music  
21 Choice air play to the sales of recorded music. We  
22 don't do those kind of studies at this time.

23 Q. Okay. Okay. And can you please turn to  
24 page 21 of your testimony. This is also a quick  
25 question.

1                   You have got a section there talking  
2 about how record companies service Music Choice. Do  
3 you see that?

4           A.    Yes.

5           Q.    And specifically you say that record  
6 labels provide free copies of the recordings to  
7 Music Choice, correct?

8           A.    Yes.

9           Q.    And that just means that they give you a  
10 password to a website and you can go there and  
11 download the music, correct?

12          A.    Well, they have multiple tactics.

13          Q.    And that's one of them?

14          A.    That's one of many.

15          Q.    Okay. And that doesn't cost anything to  
16 provide that link to Music Choice?

17          A.    No, it doesn't.

18          Q.    Okay. And you also say that record  
19 labels proactively call Music Choice weekly to  
20 promote their artists, correct?

21          A.    Correct.

22          Q.    Okay. And how long do they typically  
23 spend on the phone with you each week?

24          A.    As an aggregate --

25          Q.    I am talking about like let's say one

1 artist label or one label, how much time does the  
2 label --

3 A. Well, in my experience, a record label  
4 would call me, a typical record call could last  
5 anywhere from 30 minutes to up to an hour, depending  
6 on what we're covering because we can cover a lot of  
7 ground. Typically a record label rep has more than  
8 one song.

9 Q. Right.

10 A. So in that conversation, you can be  
11 talking about four or five songs.

12 Q. Right. But their whole job is to promote  
13 the music of the label that they represent, correct?

14 A. Yes, it is.

15 Q. So that leaves a lot of time to call  
16 other music outlets?

17 A. Sure.

18 Q. Okay. And you have no reason to believe  
19 that labels lobby Music Choice more than terrestrial  
20 radio stations?

21 A. I don't have any evidence of that, no.

22 Q. Okay. Do you think Music Choice is more  
23 promotional than Sirius XM?

24 A. Can you clarify like what do you mean by  
25 more promotional?

1 Q. Yeah, sure. So you know earlier we were  
2 talking about whether you had made an effort to  
3 quantify how much increase in sales was attributable  
4 to Music Choice.

5 A. Um-hum.

6 Q. To the extent that you think that Music  
7 Choice does drive sales. And I am asking do you  
8 think that Sirius XM drives sales more than Music  
9 Choice?

10 A. I don't think you can really try to  
11 measure Sirius XM and Music Choice. I think it is  
12 everything that we have talked about in this hearing  
13 and in my testimony today that there is an  
14 ecosystem. There is a music industry, and there is  
15 an ecosystem across a lot of different media,  
16 platforms.

17 And the way you can measure things is  
18 when you do very specific promotional programs that  
19 can be monitored and measured and you can put some  
20 metrics against it. But I can't, you know, really  
21 give you an answer to say something is  
22 substitutional or something is better than the  
23 other --

24 Q. Okay.

25 A. -- in that way.

1 Q. Got it. I want to talk a little bit  
2 about Music Choice as a vehicle for the discovery of  
3 new music.

4 A. Okay.

5 Q. And if you could turn to page 30 of your  
6 written direct testimony, please. Oh, actually,  
7 Your Honors, I apologize. I realize that this next  
8 section is restricted, if we could close the  
9 courtroom.

10 JUDGE BARNETT: We will have a brief  
11 closed session.

12 (Whereupon, the trial proceeded in  
13 confidential session.)

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1	C O N T E N T S				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	DAVID DEL BECCARO				
4		4508	4617	4673	
5	DAMON WILLIAMS				
6		4675	4733		
7					
8	AFTERNOON SESSION: 4614				
9					
10	CONFIDENTIAL SESSIONS: 4530-4559, 4570-4595,				
11	4627-4629, 4638-4639, 4658-4672, 4678, 4754-4766				
12					
13	E X H I B I T S				
14	EXHIBIT NO:	MARKED/RECEIVED		REJECTED	
15	JOINT				
16	55	4509			
17	56	4767			
18	57	4510			
19	58	4680			
20	SoundExchange				
21	MARKED FOR ID ONLY				
22	161.1	4615			
23	162	4615			
24	163	4615			
25	170	4615			

1	SoundExchange	
2		MARKED FOR ID ONLY
3	171	4615
4	173	4615
5	175	4615
6	177.1	4615
7	177.2	4615
8	179	4615
9	180.1	4615
10	180.2	4615
11	184.1	4615
12	184.2	4615
13	186	4615
14	190	4615
15	194.1	4615
16	194.2	4615
17	200	4615
18	201.1	4615
19	201.2	4615
20	203	4615
21	205	4615
22	206	4615
23	209	4615
24	210	4615
25	211	4615



1	SoundExchange	
2		MARKED FOR ID ONLY
3	212	4615
4	215	4615
5	217	4615
6	218	4615
7	219	4615
8	220	4615
9	228	4615
10	229	4615
11	233	4615
12	236	4615
13	237	4615
14	239	4615
15	263.7	4616
16	335.1	4615
17	335.2	4615
18	336	4615
19	337	4615
20	340	4615
21	341	4615
22	342	4615
23	343	4615
24	344.1	4615
25	344.2	4615

1	SoundExchange		
2		MARKED FOR ID ONLY	
3	344.3	4615	
4	345	4616	
5	367	4616	
6	368	4616	
7	369	4616	
8	SoundExchange	MARKED/RECEIVED	REJECTED
9	451		4665
10	504	4634	
11	505	4636	
12	507	4636	
13	508	4636	
14	509	4636	
15	Music Choice		
16	918	4540	
17	919	4540	
18	924	4540	
19	925	4540	
20	934	4540/4687	
21	937	4540	
22	938	4540	
23	939	4540	
24	940	4699	
25	941	4540	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	Music Choice		
3	943	4718	
4	944	4540	
5	945	4540	
6	948	4708	
7	949	4718	
8	950	4711	
9	951	4540	
10	952	4540	
11	953	4540	
12	954	4540	
13	955	4540	
14	956	4540	
15	957	4540	
16	959	4717	
17	961	4540	
18	963	4540	
19	967	4717	
20	969	4717	
21	1019		4559
22			
23			
24			
25			

## 1 CERTIFICATE

2

3 I certify that the foregoing is a true and  
4 accurate transcript, to the best of my skill and  
5 ability, from my stenographic notes of this  
6 proceeding.

7

8

9 5/18/17



10 Date

Signature of the Court Reporter

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